Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina affirming petitioner's conviction of first degree murder and sentence of death by lethal gas is reported at 285 N.C. 90, 203 S.E.2d 803 (A. 88-104). The oral opinion

of the Superior Court of Wake County finding petitioner guilty and sentencing him to die is unreported, and appears at A. 5-7.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257 (3)(1970), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgement of the Supreme Court of North Carolina was entered on April 22, 1974. (A. 104-105). The petition for certiorari was filed on July 9, 1974, and was granted on October 29, 1974. (A. 105).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves N.C. Gen. Stat. § § 14-17, 15-187, 15-188 (repl. vol. 1969), as construed in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973), which provide:

> "§ 14-17. *Murder in the first and second degree defined; punishment.*—A murder which shall be

> perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.
>
> § 15-188. *Manner and place of execution.*—The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

QUESTION PRESENTED

Does the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Following a jury trial in the Superior Court of Wake County, petitioner Jesse Thurman Fowler, a 24-year old black man (A. 3), was sentenced on September 27, 1973, to die for the first degree murder of an acquaintance, Mr. John Griffin.

This July 1, 1973, shooting grew out of an argument between Griffin and petitioner over a dice game and a fist fight earlier in the day. The two men were long-time friends who "were rather well acquainted" and who "partied together most of the time." (A. 16). They had lived together in Washington, D.C., during 1969, and petitioner had gotten a job for Griffin. (*Ibid.*).[1] Witnesses for both the State and petitioner

[1] Petitioner described their relationship:

> "I have been knowing John Griffin since about '60. I met him in Raleigh. I knew him well when I went to Washington, D.C. in 1969; we socialized together .... John came up to Washington and stayed with me for about three or four months. I got him a job at the same place I was working in General Maintenance – cleaning apartments and cutting grass. During the two years I have been back in Raleigh I have seen him several times off and on." (A. 51).

testified that Griffin had a reputation for contentiousness.[2]

On the day of the altercations which led to the shooting, a fishing expedition had been planned which never materialized. (A. 34-35). That morning, petitioner

[2] One Johnny Dolby, called by the State, testified that "[s]ome folks say John [Griffin] will knock you in the head if you turn your back" (A. 16), and added that "when he started to drinking, John Griffin had a big mouth" (A. 17). Sylvester Jones, testifying for the defense, gave a similar description:

> "Q. [defense counsel] You indicated in response to the solicitor's question – he asked you had you ever had a fight with John Griffin and you said not exactly. What sort of conflict, if any, had you ever had with John Griffin?
> A. We had an argument. I don't know if he was jiving or serious or what, you know. Seem like most of the guys that I hang around with, be around my house at the time, something will be done and say something. We don't know if they want to fight or what. John Griffin and I had arguments, over money, over girls – things like that. Like he did get in a lot of arguments. Like I said, I don't know if he was serious or what, you know. Like you can half understand. You don't know if he is serious at times or what, you know. He like to talk a whole lot. He would shoot a lot of bull. I was not afraid of John Griffin.
> Q. Did you take much of what he said seriously?
> A. All depends on what, on how I was. If I was sober, I would look at him and laugh but if I had been drinking and half mad myself, I didn't take it." (A. 42).

Another defense witness, Charles Gene Rogers, asserted:

> "John Griffin was prone to get involved in fights. I have been knowing John Griffin a pretty good while. He had a lot of fights and a lot of arguments. Well, I would say he could cause some danger, he had a big mouth. Well, I didn't take seriously what he said because I have been knowing John. I know that he always runs off at the mouth and continues to get whopped a lot by his mouth." (A. 47).

had been drinking rum and scotch at the house of one Wilbert Carter (A. 52), and then had joined in a basketball game. When the game broke up, petitioner, Griffin, one Sylvester Jones, and several other persons went to Jones' house where they began "drinking beer" and "shooting dice for money." (A. 38). Jones left the game to go to the bathroom and asked petitioner to watch his ten dollar bill; when Jones returned, the bill was gone, and he twice demanded to know where his money was. Jones then stood up and declared, "I wasn't playing. I want to know where my money was." (*Ibid.*). Griffin said nothing, and petitioner told him to give Jones his money. (*Ibid.*). Griffin remarked that he "didn't have to steal" (A. 39), returned the ten dollar bill to Jones (A. 38-39), and the game continued without further incident. (A. 41).

During the afternoon, petitioner left the dice game and went to the King's Lounge, where he spent a few hours with his wife and a friend, drinking beer and dozing. (A. 43, 45, 53-54). Griffin and Jones entered the King's Lounge, and began drinking together at a table. When petitioner went to play the jukebox, Griffin called him over and told him "if he pulled that shit like he pulled this morning, that he was going to kick his ass." (A. 39). Petitioner replied that Griffin "wasn't going to do nothing to him," and Griffin invited him outside. (*Ibid.*). Sylvester Jones testified:

> "When John invited [petitioner] ... out, John went out the door first. [Petitioner] ... came behind. When they got outside, John turned around and hit [petitioner] ... and knocked him down. I was the third one to go outside. John Griffin hit [petitioner] ... in the face somewhere. When he knocked him down, I don't know if he kneed him or kicked him, but his nose started bleeding then. That is when I broke it up. [Petitioner] ... went on the side of the building. I don't know where he went. I didn't see him no more. John Griffin came up to me then and asked me for my pistol. He knew that I had a pistol. At the time, I did not have it on me. So I told him, you know, I couldn't do that." (A. 39-40). [3]

[3] Jones also testified that petitioner "said nothing to John to make John think that he needed to have a gun, after I broke the fight up." (A. 42). Another witness to the fight, Charles Gene Rogers, testified:

> "... I saw John Griffin turn around and it appears that he hit somebody. When I got up close, he was down on him with his knee, seemed like he kneed him, too, after he hit him and so I didn't stop to see what it was. I was going to my car and a fellow pulled John Griffin off of this fellow but at the time I didn't know it was Huck [petitioner]. I didn't know Huck was on the ground because I couldn't see who John Griffin hit. Then as he was pulling him, Huck went around the building holding his [redacted] down, which I still didn't know it was him and then John Griffin told the fellow that had pulled him up to let him have a pistol that he was going to kill – well, he used some foul language at the time and he asked him a couple of times for his pistol. So I got in my car and as I was going around the King's Lounge, going out, I seen that it was Huck. Then I recognized it was Huck and I told him, I said, 'Man, you better go ahead on because John Griffin is trying to get a pistol to kill you.'" (A. 46).

Another witness to the fight, James McIntosh, gave a similar description:

> "Well, they were coming out of the door and I was trying to get in. So all of a sudden – John Griffin hit him [petitioner]." (A. 45).

Petitioner also testified that Griffin hit him in the face just as he walked out the door. (A. 54).

Petitioner left the King's Lounge, stopped at his home briefly, and then set out to see his sister-in-law. (A. 55). Shortly thereafter, Johnny Dolby, a nephew of Griffin's, stopped his car and picked petitioner up. (A. 13, 48). When Dolby remarked upon petitioner's bloody shirt, petitioner replied that he had been in a fight with John Griffin. (A. 13). Dolby testified that petitioner appeared to have been drinking and that his eyes were red. (A. 15). As they drove along Branch Street, they observed Griffin and two of his daughters talking to Mrs. Mary Raines; although neither Dolby nor petitioner called to him, Griffin walked toward them and Dolby stopped the car in the street. (A. 17). Griffin "snatched the door of the car open," but closed it again after Dolby remonstrated with him. (A. 14). Griffin declared to petitioner, "I don't want to fight you no more. I want you to go home" (*ibid.*), and petitioner said nothing (A. 17). Dolby concluded that this was simply "big talk" on Griffin's part (A. 49); he testified that although he did not know whether Griffin had been drinking, "[i]t sounded like he might have been" (A. 17). Petitioner then asked Dolby to drive him home (A. 14), but after Dolby had driven about half a block, petitioner had him stop, and petitioner left the car and walked back in the direction of Griffin (*ibid.*).

Eyewitness accounts of what happened next differ. Mrs. Mary Raines, who had been conversing with Griffin when Dolby's car stopped on Branch Street heard Griffin say to a man in the car "I am tired of you all bugging me." (A. 9). A few minutes after the car drove away, she testified that two men came running up from the direction in which the car had gone and that one of them fired two shots at Griffin

"and then I heard the gun say 'Click, click.' " (A. 9).[4] Mrs. Raines did not know the men in the car, although she assumed they were Griffin's "friends" (A. 9), and she could not identify petitioner as the person who did the shooting (A. 10).

An acquaintance of petitioner's, Charles McCoy, testified that as he was walking to his home on Branch Street at about dusk on July 1, he heard Griffin declare to petitioner and another man in a car, "take him on home before I make him use what he has in his pocket." (A. 20). A few minutes later, McCoy noticed petitioner walking along Branch Street from the direction in which the car had driven away. He testified that "I think [petitioner] ... stopped [Griffin's daughter] ... and asked where was John [Griffin]." (A. 19). McCoy, who was walking toward petitioner, felt someone bump him from behind and saw that Griffin was standing or crouching behind him. He then observed petitioner, who was three to four feet away (*ibid.*), step to the side and fire a pistol twice at Griffin. McCoy, who sustained powder burns on his left hand, saw petitioner walk away, as Griffin stumbled down the embankment to the apartment below. (*Ibid.*).

Griffin's nine-year old daughter, Paula, testified that shortly before the shooting, petitioner had walked up to her and asked her where her father was. When she told him she didn't know, she saw him fire two shots at Griffin: "[a]t the time that Jesse stepped off to the side [to shoot], Daddy was coming up close behind

[4] There was no other testimony concerning the identity of the second man who, according to Mrs. Raines, accompanied the armed man.

McCoy." (A. 33). Griffin's eleven-year old daughter, Jonice, also testified to seeing petitioner fire two shots at Griffin; just before the shooting, she observed Griffin "hiding" (A. 31) behind McCoy and advancing toward petitioner:

> "I saw my father hiding behind McCoy. McCoy was walking toward his house. My father was walking behind him, crouched down .... I saw my father get behind Mr. McCoy when Jesse came out of the car .... My father got behind McCoy, and started tipping behind him." (A. 32).[5]

After the shooting,[6] petitioner walked away, stopping at the King's Lounge for a drink (A. 59); he returned home, then talked to Sylvester Jones, stating that he had shot John Griffin and wanted to turn himself in "but .... he was kind of scared." (A. 41). Jones accompanied petitioner to the police station. Petitioner was interrogated by Raleigh Police Detective D.C. Williams early on the morning of July 2. Williams

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[5] The testimony of all the witnesses leaves it exceedingly unclear whether, when Griffin was "hiding" behind McCoy, he was advancing toward petitioner or retreating away from petitioner. The testimony does make clear that, at the time of the shooting, Griffin and petitioner must have been very close together. (McCoy testified that "John [Griffin] bumped into the back of me" just before the shooting. (A. 19). He also testified that petitioner was standing "three to four feet from me" when Griffin was shot and that the discharge from petitioner's pistol caused powder burns on his hand. (*Ibid.*).)

[6] Before Griffin died, he declared in response to Raleigh policeman Kenneth Johnson's question that "'Jesse Fowler'" had shot him. (A. 23). There was no testimony as to whether Griffin was armed at the time he was shot.

testified that "I smelled the odor of intoxicants on his breath" (A. 29) and that petitioner's eyes were "real bloodshoot" (*ibid.*), but he added that petitioner "appeared to me to be in complete control of both his mental and physical faculties" (*ibid.*). A laceration on petitioner's nose which Williams observed was later determined to indicate a broken nose. (*Ibid.*). Williams testified at some length concerning the statement petitioner made:

> "First of all, Mr. Fowler advised me that he wanted me to know and understand that when he shot John Griffin, he was drunk. He told me that he had gotten drunk on Saturday night. When he got up around 11:00 a.m. on Sunday, he had started drinking again. Stated since Saturday night he had drunk approximately sixteen beers, one pint of scotch, approximately one quart of wine; that after he had gotten up on Sunday, he went to Sylvester Jones' house, started playing dice. Shortly after he got there Sylvester Jones got up and went to the bathroom and left ten dollars lying on the floor; that when Sylvester returned, it was gone, the ten dollars on the floor. When Sylvester returned an argument started between Jesse and John Griffin over the ten dollars. Said [nothing] resulted from this argument.
>
> After they left ... Jess Fowler and his wife went to King's Lounge on Rock Quarry Road sometime around 6:00 p.m. After they had arrived there, John Griffin and Sylvester Jones came in and started drinking beer. Said Jesse went to play a record on the juke box and John Griffin came over to his table and wanted to start an argument again in reference to the ten dollars at the dice game.

John Griffin asked Jesse Fowler to come outside and to fight him. Mr. Fowler stated that he went outside and just as soon as he walked out the door, John Griffin hit him in the face, knocking him down and causing his nose to start bleeding real bad. Sylvester Jones at this time came over and stopped the fight and that Jesse Fowler and his wife went home. Stated at this time he had a .38 caliber pistol in his pocket with him.[7] After going home and staying a few minutes, he headed for Walnut Terrace to see a friend . . . .

When he got to Lenoir Street, Ronald [sic] Dolby picked him up and drove him to Walnut Terrace and they got to Branch Street; they saw John Griffin again on the sidewalk. Stated John Griffin came over to the car, opened the car door and wanted to fight him again. At this time, he told Dolby to let him out of the car so he would not get into any trouble. Stated that he started walking away and John came after him.

When John came after him, this is Mr. Fowler doing the talking – I turned and shot at him and missed. I then shot at him again and hit him. I dropped the gun and walked away.

At this time, I am high off beer and wine, but I know what I am doing and I am in my right state of mind." (A. 28-29).[8]

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[7]Petitioner had this pistol in his possession during the entire day. (A. 45, 52, 61). Witnesses testified that it was the normal practice of petitioner and his friends to carry pistols with them when they went fishing in order to be able to kill snakes. (A. 35, 38).

[8]Petitioner testified that Detective Williams' recapitulation of petitioner's oral statement of July 2 was "pretty much the same thing" he related at the police station. (A. 60).

Petitioner presented nine witnesses in his defense and also testified at length himself. He admitted the shooting, but claimed it had been in self-defense:

"John [Griffin] was headed directly down the street toward where I was standing. So I put my hand in my pocket and he pushed Charles McCoy in the back and I pulled my gun out of my pocket and I shot it one time. I kind of shot it up like in the air. I was not trying to hit anybody. I was hoping that, you know, he was turning backward.

Before I fired I saw John crouched behind McCoy for a couple of seconds or so. Charles was still between me and John. Then that is when John pushed McCoy and said, 'Nigger, I am going to make you use what you have got in your pocket.'

That is when I pulled my gun out and shot hoping he would turn around and go back. So he didn't turn. Looked like he was running faster toward me and that is when I put the gun down like this and shot him. When I shot the second time, I was as far from him as from here to that Officer. After I shot the gun, I presumed it hit him. I didn't know because he turned around and looked like he started running back down the street. I put my gun down by my side and walked across the street here." (A. 57-58).[9]

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[9]On cross-examination, the following exchange occurred between petitioner and the Solicitor:

"Q. Why did you feel it was necessary to use that gun instead of using your fists or running away; why did you have to use that gun?
A. Like I said, the first thing came to my mind John had been asking for a pistol and said that he was going to kill me. I just took my gun out and shot. If he had one to shoot me, he kept coming [sic]. So I shot the second time down and he turned around and I said, well must not have nothing [sic] and I turned around and walked off.

(continued)

Petitioner asserted that he "thought he [Griffin] was going to do something to me" (A. 58) and that he had heard Griffin "was trying to get a gun" (*ibid.*).[10]

At the conclusion of the testimony, the court instructed the jury it could return a verdict of not guilty, guilty of voluntary mansalughter, guilty of second degree murder, or guilty of first degree murder. (A. 83-84). The jury found petitioner guilty of first degree murder, and the court thereupon sentenced him to die. Petitioner's conviction and sentence were affirmed by a divided Supreme Court of North Carolina on April 10, 1974. 285 N.C. 90, 203 S.E.2d 803. (A. 88-104).

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

On appeal to the Supreme Court of North Carolina, petitioner's Assignment of Error Number 9 asserted that "[t]he imposition and the carrying out of the death

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> I didn't see a gun. When I saw John coming toward me behind Charles, I did not want to fight anymore. My intention was to get on away from there.
> Q. Weren't you pretty hot about the fact that John Griffin had mashed up your nose, kneed you in the face, kicked you when he had you down on the ground in front of your friends down in front of King's Lounge, sort of humiliated you?
> A. Nothing but a little fight. A fight that I lost. It won't [sic] the first one that I had lost." (A. 65-66).

[10]Three other witnesses testified that Griffin had asked for a pistol immediately after the fight outside the King's Lounge. (A. 40, 44, 46).

penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States . . . ." (A. 88). The Supreme Court of North Carolina explicitly rejected this contention and sustained the constitutionality of petitioner's death sentence, citing its prior decisions in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973); *State v. Blackmon*, 284 N.C. 1, 199 S.E.2d 431 (1973); and *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974). (A. 103-104).

SUMMARY OF ARGUMENT

I.

While "mandatory" in form, the North Carolina procedure for processing capital cases involves a series of uncontrolled discretionary judgements that operate to spare the lives of some defendants while others in similar circumstances are sentenced to die. As administered through such a system, the penalty of death is a cruel and unusual punishment because it has fallen in this case, and will inevitably fall, arbitrarily upon the isolated defendant, exceptional for his failure to arouse the conscience of one of many participants in the criminal justice process who have explicit or disguised power to spare his life.

II.

The punishment of death inflicted in this manner also violates the Eighth Amendment because it is

excessive and affronts the principle of human worth embodied in the prohibition of cruel and unusual punishments. No legitimate penal purpose of the State justifies the extreme cruelty of extinguishing human life; and this is in fact the verdict of Twentieth Century American history upon the death penalty. Repudiated in general application, it is tolerated only when imposed upon a random few. But the Eighth Amendment stands to assure that irregular and arbitrary exceptions are not made to the limitations imposed by contemporary standards of decency upon the State's power to punish.

ARGUMENT

I.

INTRODUCTION

In *Furman v. Georgia*, 408 U.S. 238 (1972), and its companion cases, this Court ruled that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-240. The Court accordingly entered orders vacating the death sentences of 125 condemned men in 26 States.[11]

On remand, these orders were effectuated;[12] and state courts also granted sentencing relief to other men

[11] *See Stewart v. Massachusetts*, 408 U.S. 845 (1972) and companion cases, 408 U.S. 932-941 (1972); *Moore v. Illinois*, 408 U.S. 786 (1972).

[12] *See, e.g., McCants v. State*, _____ Ala. _____, 274 So.2d 303 (1973); *State v. Sinclair*, 263 La. 377, 268 So.2d 514 (1972); *Bartholomey v. State*, _____ Md. _____, 297 A.2d 696 (1972); *State v. Terry*, 485 S.W.2d 3 (Mo. 1972); *Menthen v. State*, 502 P.2d 1304 (Okla. Ct. Cr. App. 1972).

condemned to die before *Furman* under statutes which provided for the discretionary imposition of the death penalty by juries or trial judges.[13] The result of these decisions was almost universally to forbid the infliction of capital punishment in the absence of new legislation. *See, e.g., State v. Rhodes,* _____ Mont. _____, 524 P.2d 1095 (1974); *State v. Speights,* _____ S.C. _____, 208 S.E.2d 43 (1974). Thirty States subsequently enacted some form of death penalty legislation,[14] commonly providing for a narrower range of capital offenses than those States maintained before *Furman.*[15]

[13] *See, e.g., Graham v. State*, 253 Ark. 462, 486 S.W.2d 678 (1972); *Reed v. State*, 267 So.2d 70 (Fla. 1972); *Peterson v. State*, 268 So.2d 333 (Miss. 1972); *State v. Cuckovich*, 485 S.W.2d 16 (Mo. 1972); *State v. Flonnory*, 31 Ohio St.2d 134, 285 N.E.2d 726 (1972).

[14] The statutes are summarized in Appendix A, pp. 1a-68a *infra*.

[15] With two exceptions, these States have either reduced the number of capital crimes, narrowed the definition of crimes for which the death penalty is retained, or done both. Before *Furman*, Rhode Island Gen. Laws §11-23-2 (1969) provided a death penalty for murder by a life-term prisoner. Rhode Island Public Law 1973 (Ex. Sess.), ch. 280, §1 amended this section to provide the death penalty for murder by anyone "while committed to confinement to the adult correctional institutions or the state reformatory for women." Before *Furman*, New Mex. Stat. Ann. § 40A-29-2.1 (2d repl. vol. 1972) provided the death penalty "for the crime of killing a police officer or prison or jail guard while in the performance of his duties and . . . if the jury recommends the death penalty when the defendant commits a second capital felony after time for due deliberation following commission of a capital felony." New Mex. Stat. Ann. § 40A-29-2 (1973 supp.) now provides the death penalty for a "capital felony," and New Mex. Stat. Ann. § 40A-2-1 defines first degree murder and specifies that this crime is a "capital felony." *See* Appendix A, pp. 55a and 42a-43a *infra*.

North Carolina, however, took a very different course.[16] Although the North Carolina Supreme Court had previously vacated several death sentences on *Furman* grounds,[17] it ruled prospectively in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (January 18, 1973), by a vote of four to three,[18] that the death

[16]*See* note 22 *infra.*

[17]*See, e.g., State v. Blackmon*, 284 N.C. 1, 199 S.E.2d 431 (1973); *State v. Watkins*, 283 N.C. 504, 196 S.E.2d 750 (1973); *State v. Westbrook*, 281 N.C. 748, 191 S.E.2d 68 (1972); *State v. Doss*, 281 N.C. 751, 191 S.E.2d 70 (1972); *State v. Chance*, 281 N.C. 746, 191 S.E.2d 65 (1972); *State v. Hamby*, 281 N.C. 743, 191 S.E.2d 66 (1972); *State v. Miller*, 281 N.C. 740, 190 S.E.2d 841 (1972).

[18]Chief Justice Bobbitt, Chief Justice-Elect Sharp, and Mr. Justice Higgins dissented in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19, 30-48 (1972) from the majority's interpretation of *Furman*, and have dissented from each subsequent affirmance of a death penalty on *Waddell* grounds. *See State v. Sparks*, ____ N.C. ____, 207 S.E.2d 712, 720 (1974); *State v. Honeycutt*, 285 N.C. 174, 203 S.E.2d 844, 849 (1974); *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803, 815 (1974) (A. 104); *State v. Crowder*, 285 N.C. 42, 203 S.E.2d 38, 47 (1974); *State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10, 27 (1974); *State v. Dillard*, 285 N.C. 72, 203 S.E.2d 6, 9 (1974); *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750, 770 (1974); *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721, 747-750 (1974).

> "I do not think *any death sentence* may be constitutionally inflicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment .... [T]his Court has no right to ignore, delete or repeal these provisions, which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death

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penalty could continue to be imposed for North Carolina's four pre-*Furman* capital crimes[19] without the enactment of new legislation. In *Waddell*, the appellant had been condemned to die for rape under a statute, N.C. Gen. Stat. §14-21 (repl. vol. 1969), which provided:

> "[e]very person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment

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> sentence was permissible. *Furman* did not repeal them. This Court has no right to repeal them."

State v. Waddell, supra, 194 S.E.2d at 31 (dissenting opinion of Chief Justice Bobbitt) (emphasis in original).

> "The question of capital punishment ... is one of momentous public policy .... It is not for this Court to declare either by unanimous decision or by four-three division."

State v. Jarrette, supra, 202 S.E.2d at 750 (dissenting opinion of Chief Justice-Elect Sharp).

> "The fixing of punishment for crime is a legislative function."

State v. Waddell, supra, 194 S.E.2d at 44 (dissenting opinion of Mr. Justice Higgins).

[19]At the time of *Waddell*, a death penalty was authorized as the punishment for first degree murder, N.C. Gen. Stat. §14-17 (repl. vol. 1969); rape, N.C. Gen. Stat. §14-21 (repl. vol. 1969); first degree burglary, N.C. Gen. Stat. §14-52 (repl. vol. 1969); and arson, N.C. Gen. Stat. §14-58 (repl. vol. 1969).

shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."[20]

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[20]The other North Carolina statutes authorizing the imposition of the death penalty contained similar provisions empowering the jury to make a binding recommendation of mercy:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison."

North Carolina General Statutes § 14-17 (repl. vol. 1969);

> "Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

North Carolina General Statutes §14-52 (repl. vol. 1969);

> "Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

North Carolina General Statutes §14-58 (repl. vol. 1969).

After analyzing the opinions of the concurring Justices in *Furman*,[21] the *Waddell* majority concluded that "capital punishment has not been declared unconstitutional *per se*," 194 S.E.2d at 25, and that "[i]t is the proviso [authorizing the jury to recommend mercy in a capital case] and the proviso alone – which creates the discretionary difficulty condemned by the *Furman* decision." 194 S.E.2d at 26-27. The majority held that *Furman* invalidated *only* this proviso, and that the remainder of §14-21, providing a "mandatory" death penalty for rape, was fully operative:[22]

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[21]"[S]ince the decision in *Furman* is not grounded on prior decisions of the Court, the scope of that holding must be gleaned from the separate opinions of the Justices themselves." *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19, 23 (1973).

[22]The Delaware Supreme Court also ruled initially that the effect of *Furman* was to invalidate the provisions of that State's capital punishment laws which empowered the jury to recommend mercy, leaving a "mandatory" death penalty for first degree murder. *State v. Dickerson*, 298 A.2d 761 (Del. 1972). However, *Dickerson* has been nullified (although not explicitly overruled) by a later decision which applies a subsequently enacted Delaware statute retrospectively to forbid the subjection of any defendants to the *Dickerson* "mandatory" death penalty. *State v. Smith*, Del. Sup. Ct. No. 52, 1974 (July 31, 1974).

Trial court rulings similarly "severing" discretionary capital punishment statutes to create "mandatory" death penalties have been reversed by state supreme courts in Montana and South Carolina, in decisions which held the capital punishment provisions of these States' pre-*Furman* statutes wholly inoperative. *State v. Rhodes*, _____ Mont. _____, 524 P.2d 1095 (1974); *State v. Speights*, _____ S.C. _____, 208 S.E.2d 43 (1974). The Utah Supreme Court has reversed a similar

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"It is the proviso which confers upon juries the discretion to send one defendant to death and another to prison for life for the same crime committed under substantially similar circumstances. This, and only this, is what *Furman* condemns as violative of the Eighth and Fourteenth Amendments. The proviso, then, can no longer be given effect as part of the law of North Carolina. This leaves in effect the original statute making the death sentence mandatory upon a conviction of rape, and forbids an instruction to the jury that it may, in its discretion, fix a different punishment.

. . . .

[W]e hold that the effect of the *Furman* decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore

(footnote continued from proceeding page)

ruling although its decision appears to permit some form of discretionary capital punishment, notwithstanding *Furman*. *State v. Winkle*, Utah Sup. Ct. No. 13280 (Nov. 18, 1974).

Similar severability decisions by trial courts are now pending on appeal in state supreme courts. *State v. Martin*, Pa. Sup. Ct. No. 44 (March Term 1974); *Commonwealth v. Johnson*, Mass. Sup. Jud. Ct. No. 15, 428.

no longer a proper subject for an instruction by the judge."

194 S.E.2d at 28-29.[23] Under the procedure thus established, at least 52 defendants[24] have been sentenced to die in North Carolina for offenses committed between January 18, 1973 (the date of the *Waddell* decision) and April 8, 1974 (the date when a new North Carolina capital punishment statute went into effect).[25]

Petitioner's case presents the single question whether he and the more than half a hundred other persons condemned to die pursuant to *Waddell* can constitutionally be put to death. To the extent that *Waddell* represents the mere decision of a state-law question of statutory severability – however tortuous,[26] and

[23] The court held, however, that appellant Waddell could not be sentenced to death consistently with the ex post facto clauses of the federal and state constitutions. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19, 29 (1973).

[24] *See* Appendix B, pp. 1b-7b *infra*.

[25] This statute was enacted on April 8, 1974 effective immediately. It repealed the death penalty for first degree burglary and arson, divided the crime of rape into "first degree rape" and "second degree rape" and retained the death penalty only for "first degree rape," and retained the death penalty for first degree murder. The new statute does not, by its terms, have retrospective application. *See* Appendix A, pp. 45a-46a *infra*.

[26] *See United States v. Jackson*, 390 U.S. 570, 580 (1968):

"[i]t is one thing to fill a minor gap in a statute – to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality."

however exemplary of the kind of "luck-of-the-draw justice"[27] through which life is forfeited by fortuity[28] whenever capital punishment is practiced – it is of course unreviewable here. But this is not the first time in recent years that this Court has encountered uses of state-law severability doctrine to emasculate a constitutional decision forbidding the imposition and carrying out of impermissible death sentences. *Funicello v. New Jersey*, 403 U.S. 948 (1971) (alternative ground); *Thomas v. Leeke*, 403 U.S. 948 (1971).[29] Such uses

[27]BEDAU, THE DEATH PENALTY IN AMERICA 411 (rev. ed. 1967).

[28]*See* note 63 *infra*.

[29]These two cases involved provisions of New Jersey and South Carolina law which allowed capitally-charged defendants to avoid the possibility of a death sentence by pleading *non vult* (in New Jersey) or guilty (in South Carolina), and thus affronted the rulings in *United States v. Jackson*, 390 U.S. 570 (1968), and *Pope v. United States*. 392 U.S. 651 (1968). The South Carolina Supreme Court in *Thomas* recognized the incompatibility of its State's statutory guilty-plea scheme with the constitutional principle of *Jackson*, but held that the result was to invalidate and sever the guilty-plea provision, leaving the death penalty standing. The New Jersey Supreme Court attempted to distinguish *Jackson* but held alternatively that, if *Jackson* did invalidate New Jersey's *non vult* provision, that provision rather than the death penalty would be rendered inoperative. In both cases, then, the state-court reaction to decisions of this Court invalidating a composite statutory death-sentencing procedure under which unknown numbers of capital defendants had escaped the death penalty while others had unconstitutionally been sentenced (and many sent) to their deaths, was to sever the escape clause, treat it as though it had never existed for constitutional as well as state-law purposes, and condemn those denied its benefits to die. In both cases, this Court rejected the device, and reversed.

require the Court to look beyond state-law doctrinal adjustments and to apply the Constitution to the realities of what the state courts "do in fact." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

What *Waddell* has done in fact is to change the rules, but not the nature or the result, of the "ghastly . . . lottery"[30] prohibited by *Furman*. During the quarter of a century between the enactments of the recommendation-of-mercy provisos by the North Carolina legislature and the date of *Waddell*, countless men died and others guilty of identical crimes were spared from death pursuant to one form of arbitrary selective procedure which – as the North Carolina Supreme Court itself concludes – fell unmistakably under *Furman's* prohibition. The response of four Justices of that court is to say essentially that, because the persons spared should not have been spared (under an appropriate elaboration of state severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-*Furman* statute authorizing capital punishment would be arbitrary and selective, and hence a cruel and unusual punishment, in the wake of *Furman*. Henceforth, *different* arbitrary selective procedures are to be used to decide whether particular defendants are or are not "fit to live";[31] that

[30]West, *Medicine and Capital Punishment* in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess. on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970).

[31]*Witherspoon v. Illinois*, 391 U.S. 510, 521 n.19 (1968).

intractable judgment is to be made in numerous covert ways which conceal while increasing the irregularity, irrationality, and irresponsibility of the life-or-death decisions. (*See* Part II, pp. 26-101 *infra.*) Moreover, the historical lesson learned through decades of overtly discretionary capital sentencing – that the death penalty is no longer "widely accepted,"[32] but is instead resoundingly repudiated by the institutions of criminal justice that have actually borne the terrible responsibility for choosing between life and death as the disposition for even the most heinous of offenders (*see* Part III, pp. 102-140 *infra*) – is to be ignored, as though it never happened. With all respect, this result is heedless of *Furman*, heedless of reality and history, and forbidden by the Eighth and Fourteenth Amendments.

II.

THE ARBITRARY INFLICTION OF DEATH

Although the prevailing *Furman* opinions differ somewhat in regard to the questions left unanswered by the square holding of that case, each opinion condemns at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic

[32] *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion of Chief Justice Warren).

selective processes.[33] *Furman* thus accords contemporary recognition to a central historic concern of the

[33] The concurring opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-373) shared the view that the death penalty is unconstitutional *per se* regardless of the presence or absence of selectivity in the procedural system through which it is administered.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional" if it were in fact applied wholly non-selectively, 408 U.S. at 257, but held the death sentences under review in *Furman* and companion cases incompatible "with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments," *ibid.*, because they were "imposed pursuant to a procedure that gives room for the play of . . . prejudices," 408 U.S. at 242, and allows the application of capital punishment "selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." 408 U.S. at 245.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question" whether "the infliction of the death penalty is constitutionally impermissible in all circumstances," 408 U.S. at 306, since he found that the death sentences under review were returned "under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore violated the Eighth and Fourteenth Amendments. "[O]f all of the people convicted of rapes and murders . . ., many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote ommitted).

Mr. Justice White declined to consider the question whether "the death penalty is unconstitutional *per se*," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

Eighth Amendment: "that government by the people, instituted by the Constitution, . . . not imitate the conduct of arbitrary monarchs." *Weems v. United States*, 217 U.S. 349, 376 (1910).

As this Court has recognized,[34] the Cruel and Unusual Punishments Clause of the Eighth Amendment is derived from the almost identically worded Tenth Clause of the English Bill of Rights of 1689.[35] The preamble to the Bill of Rights declared that James II had endeavored to "subvert" the "laws and liberties of this kingdom" by arbitrarily "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of parliament."[36] The first two Clauses accordingly declared such conduct on the part of the King and the royal

[34] *In re Kemmler*, 136 U.S. 436, 446 (1890).

[35] Modern historical scholarship lends support to this conclusion. *See* SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 41 (1971). The "Declaration of Rights," which William and Mary signed on February 13, 1689, before their coronation, was reenacted with minor additions as a statute (the "Bill of Rights") by Parliament later that year. 1 W. & M., sess. 2, ch. 2 (1689), VI STAT. OF THE REALM 142-145. *See also* 5 PARL. HIST. ENG. 483-490 (1688-1704) (Cobbett ed. 1809); BROWNING, ENGLISH HISTORIC DOCUMENTS 1660-1714 122-128 (1953); BAXTER, BASIC DOCUMENTS OF ENGLISH HISTORY 159 (1968). Clause 10 provides: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 5 PARL. HIST. ENG. 485 (1688-1704) (Cobbett ed. 1809). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[36] Of particular concern to Parliament was James II's claim that the royal prerogative authorized him to ignore the statutes prescribing religious qualifications for the holding of public office, 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 87, 89 (1938), and to imprison subjects when no statute or common law principle authorized such a punishment, 2 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 515 (1850). This royal claim was facilitated by the 1686 decision of the King's Bench in *Godden v. Hales*, 2 Show. K.B. 475, 89 Eng. Rep. 1050, 11 Howell St. Tr. 1197 (Trinity Term, 2 Jac. 2) (1686), a collusive action arranged by James II before handpicked judges to secure judicial approval of the royal power arbitrarily to disregard the enactments of Parliament. KENYON, THE STUART CONSTITUTION, 1603-1688 420-426 (1966). The Court ruled: "That the laws of England are the King's laws, That therefore it is an inseparable prerogative in the Kings of England to dispense with penal laws in particular cases and upon particular reasons, That of those reasons and those necessities the King himself is the sole judge." 11 Howell St. Tr. at 1199. This decision confirmed the Parliamentary belief "that the Crown must be limited, controlled, and [made] inferior to the laws of the land," HUGHES & FRIES, CROWN AND PARLIAMENT IN TUDOR–STUART ENGLAND 291 (1959); the realization by both Whigs and Tories "of the inadequacy of the laws of Parliament to withstand the attacks of the King was the beginning of their rejection of James and the real commencement of the revolution of 1688." *Id.* at 294.

judges illegal,[37] and Clause 10 prohibited the infliction of "cruel and unusual punishments." The legislative history of this provision makes clear that it was intended to prohibit the infliction of harsh punishments that were arbitrarily imposed.[38]

While the Bill of Rights was pending in Parliament, an Anglican clergyman, Titus Oates, appealed his 1685 perjury conviction to the House of Lords. Oates had

[37] These two Clauses flatly overruled *Godden v. Hales, supra* note 36, declaring:

> "1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."

5 PARL. HIST. ENG. 485 (1688-1704) (Cobbett ed. 1809). A significant new phrase was also added to the Coronation Oath: henceforth, the ascending monarch was to swear to govern according to "the statutes in Parliament agreed upon, and the laws and customs of the same." WILLIAMS, THE EIGHTEENTH–CENTURY CONSTITUTION, 1688-1815: DOCUMENTS AND COMMENTARY 3, 37 (1960). "The oath in its previous form had pledged the King to 'grant and keep' the laws and customs 'granted' by his predecessor. If the laws were merely the King's grants, then it might be contended that he could revoke them. Henceforth, it was plain that he was bound by the laws." 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 176-177 (1938).

[38] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 859 (1969); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 844 (1972).

been convicted in the King's Bench of giving false testimony during the "Popish Plot" trials of 1678-1679, and had been sentenced to be defrocked, to serve a term of life imprisonment, to pay a large fine, to be twice severely whipped, and to be pilloried four times a year.[39] This punishment was harsh,[40] discriminatory and arbitrary in the extreme – a manifest attempt to avenge Oates' anti-Catholic intrigues against James II (who had then been Duke of York) by the imposition of punishments that were both unauthorized by statute and outside the jurisdiction of the sentencing court.[41]

[39] For discussions of this phase of the *Oates* case, see CLARK, THE LATER STUARTS, 1660-1714 88-92 (1934); BROWNING, ENGLISH HISTORICAL DOCUMENTS, 1660-1714 12-15 (1953); 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 61-65 (1938); LANDON, THE TRIUMPH OF THE LAWYERS: THEIR ROLE IN ENGLISH POLITICS, 1678-1689 181-183 (1969).

[40] The lengthy flogging prescribed for Oates was apparently intended to be fatal: "the court, having no power to hang him, plainly intended that he should be flogged to death." 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND 1642-1801 142 (1938). This was the contemporary understanding of the court's intent. In 1689, the House of Commons resolved "[t]hat it was illegal, cruel, and of dangerous example that a freeman [Oates] should be whipped in such a barbarous manner, as, in all probability, would determine in death." 5 PARL. HIST. ENG. 387 (1688-1704) (Cobbett ed. 1809).

[41] Imprisonment for life could not at that time be imposed for perjury (a misdemeanor), 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1660-1801 142 (1938); and "[o]nly a spiritual court could degrade a priest," *ibid.* According to Macaulay, "that the sentence [imposed on Oates] was illegal was a proposition that admitted of no dispute." 3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 308 (1850).

Oates' conviction and sentence were affirmed in the House of Lords, with thirteen of the Members dissenting strongly on the grounds that these punishments were "cruel, barbarous, and illegal" and "contrary to the Declaration [of Rights] of the 12th of Feb. last . . . whereby it doth appear, that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual punishments inflicted."[42] Oates

[42]5 PARL. HIST. ENG. 291-292 (1688-1704) (Cobbett ed. 1809). This dissent declared:

> "1. 'For that the King's-bench, being a temporal court, made it part of the Judgment, That Titus Oates, being a clerk, should, for his perjuries, be divested of his canonical and priestly habit, and to continue divested all his life: which is a matter wholly out of their power, belonging to the ecclesiastical courts only. 2. For that the said Judgments are barbarous, inhuman, and unchristian. And there is no precedents [sic] to warrant the punishments of whipping, and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him ... 4. For that this will be an encouragement, and an allowance, for giving the like cruel, barbarous, and illegal Judgments hereafter, unless this Judgment be reversed. 5. Because sir John Holt, sir Henry Pollexfen, the two Chief Justices, and sir Robert Atkins chief baron, with six Judges more (being all that were then present), for these and many other Reasons, did, before us, solemnly deliver their Opinions; and unanimously declare, That the said Judgments were contrary to law, and ancient practice; and therefore erroneous, and ought to be reversed. 6. Because it was contrary to the Declaration of the 12th of Feb. last, which was ordered by the lords spiritual and temporal, and commons, then assembled; and by their Declaration ingrossed in parchment, and inrolled among the Records of parliament, and recorded in Chancery; whereby it doth appear, that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel and unusual punishments inflicted.' "

then sought relief in the House of Commons, where his cause was strongly taken up by militant Protestants, who secured passage of a resolution "That Bills be brought in to reverse the Judgments against Mr. Oates . . . as cruel and illegal."[43] Sir William Williams declared during the debate on this bill: "let any man give us a precedent to square with that Judgment. It makes the Judges arbitrary, and hereafter the Judges may be most injurious in punishing."[44] When a deadlock occurred with the House of Lords over a collateral matter,[45] one of the floor managers from the Lords (whose bill gave Oates more limited relief than the Commons bill) admitted that the Oates judgment was illegal but declared that Oates deserved punishment for his libels. A Member of Commons responded:

> " 'Be it so. This bill gives him no indemnity. We are quite willing that, if he is guilty, he shall be punished. But for him, and for all Englishmen, we demand that punishments shall be regulated by

[43]5 PARL. HIST. ENG. 296 (1688-1704)(Cobbett ed. 1809).

[44]*Id.* at 294.

[45]The Commons had also declared that the perjury judgements against Oates were "corrupt." 5 PARL. HIST. ENG. 392 (1688-1704) (Cobbett ed. 1809), and it was this allegation that the Lords would not agree to. *Id.* at 394.

law, and not by the arbitrary discretion of any tribunal.' "[46]

By the time of the framing of the American Bill of Rights, eight States had adopted prohibitions of "cruel and unusual punishments" that were modeled upon

[46]3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 310 (1850). The floor managers of the Commons bill reported back to the House of Commons on their difficulties in securing an acceptable compromise bill from the House of Lords:

> "the commons had hoped, that, after the Declaration [of Rights] presented to their majesties upon their accepting the crown (wherein their lordships had joined with the commons in complaining of the cruel and illegal punishments of the last reign; and in asserting it to be the ancient right of the people of England, that they should not be subjected to cruel and unusual punishments; and that no judgments to the prejudice of the people in that kind ought in any-wise to be drawn into consequence, or example); and after this Declaration had been so lately renewed in that part of the Bill of Rights which the lords had agreed to; they should not have seen Judgments of this nature affirmed, and been put under a necessity of sending up a Bill for reversing them; since those Declarations will not only be useless, but of pernicious consequence to the people, if, so soon after, such Judgments as these stand affirmed, and be not taken to be cruel and illegal within the meaning of those Declarations–That the commons had a particular regard to these Judgments, amongst others, when that Declaration was first made; and must insist upon it, that they are erroneous, cruel, illegal, and of ill example to future ages. . . . That it was surely of ill example for a temporal court to give judgment, 'That a clerk be divested of his canonical habits; and continue so divested during his life.' That it was of ill example, and illegal, that a Judgment of perpetual imprisonment should be given in a case, where there is no express law to warrant it."

5 PARL. HIST. ENG. 386-387 (1688-1704) (Cobbett ed. 1809). Oates was pardoned by King William before the differences between Commons and Lords were finally resolved. *Id.* at 399.

Clause 10 of the English Bill of Rights,[47] and the federal government had inserted a similar provision into the Northwest Ordinance of 1787.[48] Because early American legal history is so obscure, it is not possible to know exactly what the draftsmen of these provisions intended.[49] However, whatever else such clauses were

[47]Virginia Constitution of 1776, Declaration of Rights, §9 (7 THORPE, FEDERAL AND STATE CONSTITUTIONS 3813 (1909); (*see also* RUTLAND, THE BIRTH OF THE BILL OF RIGHTS OF 1791 35-36, 232 (1955)); Delaware Declaration of Rights of 1776, § 16 (1 Del. Code Ann. § 83 (1953)); North Carolina Constitution of 1776, § 10 (5 THORPE, *supra*, at 2788); Maryland Constitution of 1776, § 22 (3 THORPE, *supra*, at 1688); Massachusetts Constitution of 1780, art. 26 (3 THORPE, *supra*, at 1892); New Hampshire Constitution of 1784, §33 (4 THORPE, *supra*, at 2457); Pennsylvania Constitution of 1790, art. 9, §13 ("... nor cruel punishments inflicted") (5 THORPE, *supra*, at 3101); South Carolina Constitution of 1790, art. 9, §4 ("... nor cruel punishments inflicted") (6 THORPE, *supra*, at 3264). *Cf.* Vermont Constitution of 1777, ch. 2, § 35 (6 THORPE, *supra*, at 3747): "To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing, by hard labor, those who shall be convicted of crimes ...."

[48]Ordinance of 1787, The Northwest Territorial Government, art. II (Confederation Congress, July 13, 1787): "All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." *See* 1 U.S.C. xxxvii-xxxviii (1964).

[49]"Legal development is probably the least known aspect of American colonial history. Judicial opinions were not recorded in the colonies, no year books were issued, and the printed materials for legal and judicial history have been so scanty as to preclude the more cautious historians from dealing with this important side of colonial life." MORISON (ed.), RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680 unpaginated preface (1933).

intended to prohibit, it is unlikely that they were not intended to guard against the arbitrary infliction of harsh punishments. For there is evidence that the colonists were concerned with this issue. In 1635, Governor John Winthrop described the attempts of the Massachusetts Bay Colonists to draft a comprehensive criminal code in order to limit the discretion of the magistrates: "The deputies having conceived great danger to our state in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions, it was agreed, that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws."[50] The writings of Blackstone, whose influence on the development of colonial American law was enormous,[51] had echoed the 1689 Parliamentary debates concerning the *Oates* case by stressing the fact that English law did not allow the arbitrary infliction of punishment:

> "it is moreover one of the glories of our English law, that the nature, though not always the quality or degree, of punishment is ascertained for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment,

[50] WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686 5 (1889).

[51] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 862 (1969). Edmund Burke announced to Parliament in 1775 that almost as many copies of Blackstone's *Commentaries* had been sold in the American colonies as in Great Britain. SUTHERLAND, THE LAW AT HARVARD 25 (1967).

> which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slave to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under . . . . [W]here an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge of his actions."[52]

Finally, the American statesmen who framed the state and federal prohibitions on cruel and unusual punishments in the late Eighteenth Century typically believed that their rebellion against Britain had been justified in order to preserve their inherited English civil rights and political freedoms:[53] "from a purely legal interpretation, the American Revolution itself, as the Americans saw it, was largely the result of England's disregard of the common-law rights of the Colonists."[54] It therefore appears unlikely that they would consciously have

[52] 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 371-372 (1st ed. 1769).

[53] *See* BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 1-54 (1967).

[54] LEVY, ORIGINS OF THE FIFTH AMENDMENT 337 (1968).

rejected or limited any of their traditional liberties,[55] including the right against arbitrary infliction of harsh punishments. George Mason, the author of both the Virginia Declaration of Rights and the amendments proposed to Congress by the Virginia ratifying convention,[56] stressed the necessity of limiting all forms of American governmental authority by such guarantees of individual liberty:

> "In the declaration of rights which that country [Great Britain] has established, the truth is, they

[55]The legislative history of adoption of the Eighth Amendment is sparse and not particularly illuminating as to the purposes of the Framers. *See* 2 ELLIOT'S DEBATES 111 (2d ed. 1863); 3 ELLIOT'S DEBATES 447-448, 451, 452 (2d ed. 1863); 1 ANNALS OF CONGRESS 754 (1st Cong., 1st Sess. 1789). There is evidence, however, that in certain ratifying conventions, opponents of the Constitution feared that, without a Bill of Rights, Congress would be free to devise whatever criminal punishments it wished and that tortures might be instituted. Patrick Henry, for example, declared to the Virginia Convention: "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives [in Congress] .... Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control [a constitutional prohibition on "cruel and unusual punishments"]? .... You let them loose; you do more – you depart from the genius of your country." 3 ELLIOT'S DEBATES 447-448 (2d ed. 1863). There is thus some evidence that the Framers were concerned to limit the discretion of *legislators* to devise punishments, and there is no indication whatsoever in any of the debates that they would have approved an arbitrary freedom on the part of magistrates to impose criminal punishments.

[56]*See* 1 ROWLAND, LIFE OF GEORGE MASON 234-250 (1892).

> have gone no farther than to raise a barrier against the power of the Crown; the power of the legislature is left altogether indefinite ....
>
> But although ... it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States. The people of many states have thought it necessary to raise barriers against power in all forms and departments of Government ...."

1 ANNALS OF CONGRESS 436 (1st Cong., 1st Sess. 1789).

The arbitrary infliction of death which this Court condemned in *Furman* and companion cases arose, of course, from various procedures[57] whereby juries (or judges) were given the option to sentence convicted capital offenders to life (or term) imprisonment or death.[58] But – particularly in the light of *McGautha v. California*, 402 U.S. 183 (1971) – it is impossible to read *Furman* as prohibiting only the explicit statutory annunciation of jury discretion to impose alternative sentences of imprisonment or capital punishment. Surely *Furman* and the Eighth Amendment forbid *any* arbitrarily selective imposition of the "unique penalty" of death,[59] whatever the source or mechanism of the arbitrariness. See *Commonwealth v. A Juvenile*, 1973

[57]For a description of some of these variations, see *State v. Rhodes*, _____ Mont. _____, 524 P.2d 1095, 1099 (1974).

[58]*See McGautha v. California*, 402 U.S. 183, 197-203 (1971).

[59]*Furman v. Georgia, supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[60] The particular *method* of selecting some men to die while others in like cases live with "no meaningful basis for distinguishing" among them[61] cannot be thought constitutionally decisive. For the Federal Constitution is not ordinarily concerned with the forms of state procedure, but with their result. *See, e.g., Chambers v. Mississippi,* 410 U.S. 284, 302-303 (1973); *Mempa v. Rhay,* 389 U.S. 128, 135-137 (1967); *Jackson v. Denno,* 378 U.S. 368, 391 n.19 (1964), It "nullifies sophisticated as well as simple-minded modes" of producing unconstitutional consequences. *Lane v. Wilson,* 307 U.S. 268, 275 (1939). Federal constitutional guarantees cannot – as Justice Holmes wrote in another context – "be evaded by attempting a distinction" of form without a difference in substance. *Davis v. Wechsler,* 263 U.S. 22, 24 (1923).

[60]In *Commonwalth v. A Juvenile*, the Massachusetts Supreme Judicial Court held a "mandatory" death penalty statute unconstitutional under the Eighth Amendment where death was the "mandatory" punishment for a specified crime but discretionary mechanisms existed by which a trial court could avoid subjecting a particular defendant to that "mandatory" sentence. The case involved a juvenile who had been condemned under a statute which made death the "mandatory" punishment for rape-murder. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was mandatory, see Mass. Gen. Laws Ann. c. 265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since *Furman* invalidated "*discretionary* imposition of the death sentence." 300 N.E.2d at 442 (emphasis in original).

[61]*Furman v. Georgia, supra,* 408 U.S. at 313 (concurring opinion of Mr. Justice White).

To be sure, *Waddell's* annulment of the North Carolina "recommendation" statute ostensibly made death the exclusive punishment for first degree murder, rape, first degree burglary and arson. But the implementation of the death sentence for this broad range of offenses inevitably required the exercise of vast and uncontrolled selective discretion by district attorneys, trial judges, juries and the Governor in choosing which defendants would live and which would die in cases where the death penalty was potentially applicable after *Waddell.* Language requires that the several practices through which unrestrained and arbitrary discretion infects the administration of the death penalty under *Waddell* be described separately, as we shall do in the following subsections of this brief. But the practices plainly operate cumulatively to produce the kind of extreme uncertainty and unpredictability in the infliction of the death penalty that violates *Furman's* ban.

> "There is . . . danger in treating any one stage [of the criminal justice process] as if it were a self-contained system rather than merely one decision in an ongoing process of interrelated decisions and consequences of decisions. An assumption, explicit or implied, that adjudication is in fact a quasi-automatic, nondiscretionary process, turning solely on matters of sufficient evidence, is a gross oversimplification . . . ."

NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 150 (1966).[62] Thus as demonstrated by Professor Charles

[62]*See also* Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 14-15 (1972).

Black in his recent trenchant analysis,[63] the result of

[63]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974). Professor Black points out the numerous discretionary decisions made at every stage of the criminal justice process, with life and death consequences, and emphasizes:

> "Regarding *each* of these choices, through all the range, one of two things, or perhaps both, may be true.
>
> First, the choice made may be a mistaken one. The defendant may not have committed the act of which he is found guilty; the factors which ought properly to induce a prosecutor to accept a plea to a lesser offense may have been present, though he refused to do so; the defendant may have been 'insane' in the way the law requires for exculpation, though the jury found that he was not. And so on.
>
> Secondly, there may either be no legal standards governing the making of the choice, or the standards verbally set up by the legal system for the making of the choice may be so vague, at least in part of their range, as to be only *apparent* standards, in truth furnishing no direction and leaving the actual choice quite arbitrary.
>
> These two possibilities have an interesting (and, in the circumstances, tragic) relationship. The concept of *mistake* fades out as the *standard* grows more and more vague and unintelligible. There is no vagueness problem about the question 'Did Y hit Z on the head with a piece of pipe?' It is, for just that reason, easily possible to conceive of what it means to be 'mistaken' in answering this question; one is 'mistaken' if one answers it 'yes' when in fact Y did not hit Z with the pipe. It is even fairly clear what it means to be 'mistaken' in answering the question 'Did Y *intend* to kill Z?' Conscious intents are facts; the difference here really is that, for obvious reasons, *mistake is more likely* in the second case than in the first, for it is hard or impossible to be confident of coming down on the right side of a question about past psychological fact.

(continued)

numerous interrelated arbitrary processes in the administration of the death penalty in North Carolina is exactly the result condemned by *Furman*: death sentences which are "wantonly and . . . freakishly imposed." *Furman v. Georgia, supra,* 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

And this means not merely that a few men die for crimes no more atrocious than the crimes of many who are spared.[64] It means also that society's most extreme and irremediable punishment is likely to be practiced principally upon the outcast of society. Discrimination is inseparable from arbitrariness wherever social atti-

(footnote continued from proceeding page)

> It is very different when one comes to the question, 'Was the action of which the defendant was found guilty performed in such a manner as to evidence an 'abandoned and malignant heart'?' (This phrase figures importantly in homicide law.) This question has the same grammatical form as a clearcut factual question; actually, through a considerable part of its range, it is not at all clear what it means. It sets up, in this range, not a standard but a *pseudo-standard*. One cannot, strictly speaking, be *mistaken* in answering it, at least within a considerable range, because to be mistaken is to be on the wrong side of a line, and there is no real line here. But that, in turn, means that the 'test' may often be no test at all, but merely an invitation to arbitrariness and passion, or even to the influence of dark unconscious factors.
>
> 'Mistake' and 'arbitrariness' therefore are reciprocally related."

Id. at 19-21 (emphasis in original).

[64]*See, e.g.*, LAWES, TWENTY THOUSAND YEARS IN SING SING 302, 307-310 (1932); DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 254-255 (1962); De Ment, *A Plea for the Condemned*, 29 ALA. LAWYER 440, 440-441 n.2 (1968) (quoting Commissioner A. Frank Lee, of the Alabama Board of Corrections).

tudes make men or groups unequal or unpopular. That had not ceased to be the case in England three centuries after Titus Oates,[65] and it assuredly has not ceased in this country where "[t]hroughout our history differences in race and color have defined easily indentifiable groups which have at times required the aid of the courts in securing equal treatment under the laws."[66] "It is the poor, the illiterate, the underprivileged, the member of the minority group who is usually sacrificed by society's lack of concern."[67] To believe that this discrimination can be ended or controlled by the annulment of forthright jury discretion in capital sentencing in North Carolina blinks reality. For,

> "discretion in the imposition of the death penalty will continue to be exercised in the prosecuting attorney's decision concerning the wording of the charge; the grand jury's decision concerning the

[65]PIERREPOINT, EXECUTIONER: PIERREPOINT 211 (1974):

> "As long as reprieves for the death sentence existed, the reason for a reprieve was always fundamentally political: an execution here would incite too much sympathy for the victim and must be respited; an execution there will show that the Home Secretary means business. The public were allowed to blow like the wind for one popular reprieve of a favourite from Hampstead, and stay dead calm about an unattractive strangling in Ashton-under-Lyne precisely because the same basic inconsistency was being operated for the policy reprieves. The trouble with the death sentence has always been that nobody wanted it for everybody, but everybody differed about who should get off."

[66]*Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

[67]DiSalle, *Trends in the Abolition of Capital Punishment*, 1 U. TOLEDO L. REV. 1, 12-13 (1969). *See also* text and notes at notes 226-227, *infra*.

> allegations of the indictment; the jury's findings concerning the existence of defenses, [and] elements of the crime . . .; and the governor's decision whether to commute the death sentence if one results. Since discretion will not be substantially restricted under the new [procedure] . . ., but merely shifted to other parts of the criminal justice process, there is little reason to expect that disproportionate application to minorities and poor people will not continue."[68]

A. Prosecutorial Charging Discretion

As long ago as 1931, the Wickersham Commission reported that "[t]he Prosecutor [is] the real arbiter of what laws shall be enforced and against whom. . . ."[69]

[68]Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 661-662 (1974). *See also* Note, *Mandatory Death: State v. Waddell*, 4 N.C. CENT. L. J. 292, 298 (1974).

[69]NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 19 (1931). *See also* DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188-214 (1971); authorities collected in note 74 *infra*. *Cf.* MOLEY, POLITICS AND CRIMINAL PROSECUTION vii (1929):

> ". . . I have attempted to indicate the very great importance of the public prosecutor, a fact which is particularly American. The sheriff and the coroner, the grand jury, and finally the petit jury, products of a long historical evolution, have quite faded into insignificance. Likewise, both the examining magistrate and the trial judge in state courts, partially through their own lack of capacity, partly through legal limitations upon their powers, and largely because they have no means for knowing what they should know about the cases before them, perform no dominant role. In the midst of the decay and impotence of his official associates, the prosecutor rises to a definite mastery. To a considerable extent, he is police, prosecutor, magistrate, grand jury, petit jury, and judge in one."

In North Carolina, the prosecuting attorney (called the Solicitor) is charged with the duty to "prepare the trial dockets, [and] prosecute in the name of the State *all criminal actions requiring prosecution* in the superior and district courts of his district," N.C. Gen. Stat. § 7A-61 (1973 cum. supp.) (emphasis added). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions,[70] *State*

[70]A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under *Waddell*. In *State v. Spicer*, 285 N.C. 274, 204 S.E.2d 641 (1974), two persons were tried and convicted for murder during the course of an armed robbery. A third person, one Brailford, had helped to plan the robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." 204 S.E.2d at 647. The Court described Brailford's criminal role in the following fashion:

> "the State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated he expected his cut. . . .
>
> The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Ibid. The other two persons involved in the robbery, Spicer and one Isaac Monk, were convicted of first degree murder and sentenced to die. Spicer's conviction has been, as indicated, reversed on grounds permitting a retrial and a new death sentence, while Monk's conviction and death sentence are now pending on appeal in the North Carolina Supreme Court. *State v. Monk*, No. 13, New Hanover County, Fall Term, 1974.

v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953),[71] including not only absolute discretion whether and what to charge,[72] but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment even if the evidence

[71]The Court also ruled in *State v. Loesch*, that the Attorney General had no supervisory jurisdiction over the several Solicitors of the State, whose offices were established by Article III, Section 18 of the State Constitution. "[T]he duty of the Attorney General in so far as it extends to the solicitors of the State is purely advisory. The Attorney General has no constitutional authority to issue a directive to any other constitutional officer concerning his legal duties." 75 S.E.2d at 656.

[72]The grand jury provides no significant check upon prosecutorial discretion since – except in a few extraordinary cases – it is heavily dominated by the prosecuting attorney. *See, e.g.*, Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1171 (1960), and authorities cited; Shannon, *The Grand Jury, True Tribunal of the People or Administrative Agency of the Prosecutor*? 2 NEW MEXICO L. REV. 141, 170 (1972); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L. J. 209, 212-213 (1955). Indeed, it is dubious that even the most conscientious grand juror, zealous to perform the grand jury's function of providing " 'a fair method for instituting criminal proceedings against persons believed to have committed crimes,' " *Costello v. United States*, 350 U.S. 359, 362 (1956) (as quoted in *Russell v. United States*, 369 U.S. 749, 761 (1962)); *accord: State v. Greer*, 238 N.C. 325, 77 S.E.2d 917, 918-919 (1953), by inquiring "into the existence of possible criminal conduct and [returning] . . . only well-founded indictments," *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *see also United States v. Calandra*, 414 U.S. 338, 343 (1974), would suppose that this function called upon him to return an indictment upon charges *greater* than those sought by the prosecutor. And, as we shall shortly see under North Carolina law, if a grand jury did return such an indictment, the prosecutor could elect not to prosecute the offense charged, but only a lesser included offense. *See* text and note at note 73 *infra*.

shows that a greater crime has been committed, *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453, 455 (1971);[73] *and see State v. Roy*, 233 N.C. 558, 64 S.E.2d 840, 841 (1951).[74]

[73]In *State v. Allen*, the Court affirmed a second degree burglary conviction in a case where the sole question presented on appeal was " 'Did the trial court commit error by placing the defendant on trial for burglary in the second degree when all the evidence tended to show burglary in the first degree?' " 181 S.E.2d at 455. The appellant was charged by indictment with first degree burglary, but at trial the solicitor announced he would seek no verdict greater than burglary in the second degree. The Supreme Court of North Carolina ruled that "the solicitor has the authority to elect not to try the defendant on the maximum degree of the offense charged but to put him on trial for the lesser degree thereof and lesser offenses included therein.... The effect of such election by the solicitor, announced as in this instance, is that of a verdict of not guilty upon the maximum degree of the offense charged, leaving for trial the lesser degree and the lesser included offenses." *Ibid.*

[74]*Cf.* Note, *Prosecutorial Discretion*, 21 DePAUL L. REV. 485, 486 (1971-1972):

> "[t]he limitations of a prosecutor's discretion are somewhat nebulous, and, in general, undefined. He has the authority by law to enforce certain laws by prosecuting offenders. Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."

See also MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 154-172, 293-350 (1969); 2 PLOSCOWE (ed), MANUAL FOR PROSECUTING ATTORNEYS 315-320 (1956); Baker & DeLong, *The Prosecuting Attorney*, 24 J. CRIM. L. & CRIM. 1025 (1934); Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507 (1957); Mills, *The Prosecutor: Charging and "Bargaining,"* 1966 U. ILL. L. F. 511; Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L. J. 209, 209-215 (1955).

The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is *State v. Casey*, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The North Carolina Supreme Court rejected this contention, commenting that the appellant had no "privilege to be tried for the capital felony" and concluding that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And following *Waddell*, the court in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that the Eighth and the Fourteenth Amendments required any circumscription of the discretion of the Solicitor in capital cases:

> "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

The consequence of this unfettered prosecutorial discretion is, of course, that different Solicitors may utilize different standards in deciding whether to initiate capital or noncapital prosecutions. Without any guidance whatsoever,[75] a Solicitor is free to make the

[75]*Cf.* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952):

> "[a] society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves."

decision whether an indictment will be sought for first or second degree murder or manslaughter,[76] for rape or assault with intent to rape, for first or second degree burglary. He may thus "without violating [his] . . . trust or any statutory policy . . . refuse to [seek] . . . the death penalty no matter what the circumstances of the crime." *Furman v. Georgia, supra,* 408 U.S. at 314 (concurring opinion of Mr. Justice White). This unconstrained discretion doubtless accounts in considerable part for the striking fact that there have been only three convictions[77] of first degree burglary during a full year of *Waddell's* implementation in a State where there were about forty convictions annually for this crime in

[76]As we demonstrate at pp. 65-76 *infra*, the distinctions among these offenses as they may apply to particular factual situations are largely intangible and judgmental.

[77]*State v. Poole, rev'd for insufficient evidence*, 285 N.C. 108, 203 S.E.2d 786 (1974); *State v. Henderson*, 285 N.C. 1, 203 S.E.2d10(1974), *petition for cert. filed sub nom. Henderson v. North Carolina*, U.S.S.C. No. 73-6853 (June 8, 1974); *State v. Boyd*, N.C. Sup. Ct. No. 7, Spring Term 1974, (pending on appeal). In *State v. Henderson, supra*, the defendant was also convicted of and sentenced to die for rape; and in *State v. Boyd, supra*, the jury was unable to agree on a homicide verdict after it was instructed that it could find the defendant guilty of second degree murder.

the recent past,[78] and where 39,210 "burglaries and housebreakings" were reported in 1972.[79] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary

[78]In 1955, the North Carolina Department of Justice ceased to report separate statistics for persons convicted of first degree burglary and of second degree burglary. In 1952, there were 47 convictions for first degree burglary in Superior Court (with 15 "Other dispositions") and 5 convictions in "inferior court" (with 64 "Other dispositions" there). 32 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1952-1954 515, 521 (1954). In 1953, there were 33 convictions for first degree burglary in Superior Court (with 10 "Other dispositions") and 4 convictions in "inferior court" (with 49 "Other dispositions" there). *Ibid.* In 1954, there were 35 convictions for first degree burglary in Superior Court (with 26 "Other dispositions") and 9 convictions in "inferior court" (with 61 "Other dispositions" there). 33 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1954-1956 377, 379 (1956). "Other dispositions" is nowhere defined; since the total of convictions and "Other dispositions" represents "cases disposed of in the Superior and inferior courts of the State," 32 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1952-1954 510 (1954), "Other dispositions" apparently includes acquittals and *nol pros's.*

[79]UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1972 74 (Aug. 1973). The Uniform Crime Reports, of course, reflect reported crimes, not convictions; and the reported "burglaries and housebreakings" doubtless exceed the total number of statutory first degree burglaries which occurred in the State during 1972. Nevertheless, it cannot rationally be imagined that only *three* first degree burglars were apprehended in North Carolina during a twelve month period.

prosecutions in cases where they might have obtained convictions for this crime.

The inconsequential number of first degree burglary convictions under the *Waddell* regime is hardly surprising, since the exercise of prosecutorial discretion to blunt the impact of "mandatory" penalties in sympathetic cases has been one of the most significant phenomena observed in the enforcement of such statutes: "[a] charge may be reduced to avoid infliction of punishment harm that administrative officials regard as too severe in relation to the suspect's conduct. Usually, a less serious offense is charged because conviction of the maximum offense carries a statutory mandatory minimum sentence."[80]

As with the death-penalty statutes struck down in *Furman*, it is not necessary to conclude that North Carolina's capital laws are being intentionally administered "with an evil eye and an unequal hand," *Yick Wo*

[80] MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 207 (1969). *Cf.* Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 49 (1972):

> "[o]fficials tend to respond to the undue harshness of punishments provided by the law by seeking discretion to avoid the imposition of that harshness in most cases. Yet, ironically, it is when the system is particularly severe that discretion may be most abusive and the temptation to act unjustly becomes greater. When the system is severe, discretionary decision-making becomes unacceptable because it reposes excessive authority in the hands of an often unsupervised individual official. In such a situation, the advantages of legal rules and process become exaggerated."

v. Hopkins, 118 U.S. 356, 373-374 (1886). The point rather is that their implementation is necessarily and unavoidably *arbitrary*. Since no standards exist to regularize the exercise of prosecutorial discretion, there is nothing to guarantee that some defendants, like petitioner, will not be capitally charged while other defendants, probably guilty of similar conduct, are prosecuted for second degree murder or manslaughter. Although the choice of charge is quite literally the difference between life and death, that choice is a completely uncontrolled, discretionary decision of the Solicitor.

B. Plea Bargaining

Another point of entrance for arbitrariness in the administration of capital punishment in North Carolina under the *Waddell* procedures is the unfettered power of the Solicitor to accept a plea of guilty to a lesser or other non-capital offense from a capitally charged defendant, and/or to *nol pros* a capital indictment. Exercise of this discretionary power undercuts the "mandatory" nature of the death penalty for first degree murder as effectively as the practice of selectively charging homicide defendants with second degree murder or manslaughter at the outset. The guilty-plea process is unregulated by law, and the discretion of a Solicitor to accept a plea to a lesser offense in a capital case is therefore quite as untrammelled as the freedom of a jury to recommend mercy in a pre-*Waddell* capital prosecution.

Plea bargaining is pervasive in the criminal justice system; guilty pleas are said to account for up to ninety per cent of all criminal convictions.[81] Indeed, in view of the judicial resources available, the systematic and extensive practice of plea bargaining appears inevitable:

> "[i]f all the defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state in the Union. But they dare not hold out, for such as were tried and convicted

[81] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). *See also* Coon, *The Indictment Process and Reduced Charges*, 40 N.Y. ST. BAR J. 434 (1968). A study of the indictments for first and second degree murder in Massachusetts between 1956 and 1965 which received a final disposition in terms of guilt or innocence revealed that 221 out of 326 defendants (67.8%) entered a guilty plea and that 93.2% of these guilty pleas were to a lesser charge. Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFF. L. REV. 292, 299 (1969). The study concluded that:

> "there is a wide disparity among the courts in terms of the proportion of guilty pleas in murder cases. This finding indicates that the practice of plea bargaining is far from uniform. It also underscores the potential risk inherent in such an informal and invisible process as plea bargaining. For example, a defendant indicted for first degree murder in one court may have a very good chance of negotiating a plea of guilty to second degree murder, while in another court such a possibility may be minimal. The implications of this are serious, since conviction for first degree murder may well result in a sentence of death.... Therefore, it seems crucial that the practice of plea bargaining be governed by specific and explicit guidelines that could be systematically and consistently applied from court to court."

Id. at 307.

> could hope for no leniency. The prosecutor is like a man armed with a revolver who is cornered by a mob. A concerted rush would overwhelm him.... The truth is that a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty."[82]

Because homicide cases are likely to take up a great deal of time in preparation and trial, they are particularly likely to be settled by plea bargaining.[83] And the fact that the harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error provides an additional incentive for plea bargaining in capital cases:

> " '[s]ince time immemorial . . . [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a murder trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an Appellate Court.' "[84]

[82] LUMMUS, THE TRIAL JUDGE 46 (1937).

[83] In the words of one prosecutor:

> " 'A murder case ties up a courtroom for a week, or at least for three days. We are naturally more anxious to bargain for guilty pleas in murder cases than we are in cases that might take fifteen minutes at trial.' "

Pittsburgh First Assistant District Attorney James G. Dunn, quoted in Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 55 (1966).

[84] Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 30 (1963) (quoting opinion of Judge C. Conrad Schneider, *State v. Faison*, No. 5-550-57, Bergen Cty. Ct., Nov. 21, 1958).

Plea bargaining almost inevitably involves a reduction in charge or sentence: "[a] promise by the prosecutor of sentence leniency or a charge reduction as a concession for a plea of guilty is a major characteristic of the negotiated plea process."[85] This Court is not unfamiliar with guilty pleas to lesser included offenses entered by North Carolina defendants charged with capital crimes, who thereby escaped possible death penalties. *North Carolina v. Alford*, 400 U.S. 25 (1970);[86] *Parker v. North Carolina*, 397 U.S. 790 (1970). Such cases are a commonplace of "capital" justice. *See, e.g., Tollett v. Henderson*, 411 U.S. 258 (1973). Indeed, the prosecutor's attitude toward plea-bargaining in the case of a death-charged defendant is "probably the most widely significant choice separating the doomed from those who . . . go to prison."[87] That attitude in turn reflects fundamentally the prosecutor's choice to insist upon or to remit the punishment of death. For his willingness to offer or accept a lesser plea (and how much lesser) responds not

[85]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 29 (1966).

[86]In *North Carolina v. Alford*, the Court noted that "the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired." 400 U.S. at 37.

[87]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 43 (1974).

merely to his estimate of trial costs and contingencies but also to his wholly discretionary judgment – sometimes reasoned, sometimes "gut," sometimes principled and independent, sometimes politically opportunistic, but always selective and subject to the influence of factors which remain "demeaningly trivial compared to the stakes"[88] – as to whether the particular offense or offender *deserves* capital punishment.[89]

Furthermore, an ostensibly "mandatory" death penalty statute is especially likely to result in the selective allowance of guilty pleas to lesser included offenses, since "[m]any prosecutors and judges . . . support the practice as both necessary and desirable . . . to achieve sentencing flexibility which would sometimes be prevented by mandatory sentences."[90] The negotiated

[88]This phrase was used by the late Professor Harry Kalven, Jr., and by Hans Zeisel to describe the factors affecting capital sentencing by juries before *Furman*. KALVEN & ZEISEL, THE AMERICAN JURY 448-449 (1966). It is equally apt to describe the factors influencing the prosecutor's plea-bargaining discretion after *Furman* and *Waddell*.

[89]*See* BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 41-44 (1974). *Cf.* note 91 *infra*.

[90]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 102 (1966). *Cf.* Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW No. 5, 25, 31-32 (1961):

> "[t]hese plea bargains perform a useful function. We have to remember that our sentencing laws are for the most part savage, archaic, and make very little sense. The penalties they set are frequently too tough . . . . The negotiated plea is a way by which prosecutors can make value judgments. They can take some of the inhumanity out of the law in certain situations."

plea is "the means by which . . . [a prosecutor] can avoid the unacceptably rigorous application of the letter of the law."[91] Prosecutors

> "declare without hesitation that one of their goals in the [plea] bargaining process is to nullify harsh, 'unrealistic' penalties that legislators have prescribed for certain crimes."[92]

It is clear that a great many capitally charged defendants in North Carolina have been allowed to plead guilty to lesser offenses and thus to escape the threat of a death penalty.[93] In other cases, however,

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[91] Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 25 (1972). *See also* Worgan & Paulsen, *The Position of a Prosecutor in a Criminal Case – A Conversation with a Prosecuting Attorney*, 7 PRAC. LAW. No. 7, 44, 53 (1961):

> "[i]n many cases we believe we mitigate the harshness of the letter of the law by taking a guilty plea. We make such decisions only after much careful thought and I think we make them in a way that the community generally approves."

[92] Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1966). *See also* 2 PLOSCOWE (ed.), MANUAL FOR PROSECUTING ATTORNEYS 319 (1956); Coon, *The Indictment Process and Reduced Charges*, N.Y. ST. BAR J. 434, 438 (1968).

[93] *See, e.g.*, the following 17 cases: *State v. Hamlin*, Wake County Super. Ct. No. 74-Cr-11895 (April 1, 1974, indictment for first degree murder; April 12, 1974, guilty plea to second degree murder, sentence of 15-20 years); *State v. Leroy Johnson*, Wake County Super. Ct. No. 74-Cr-7160 (February 25, 1974, indictment for first degree murder; March 8, 1974, guilty plea to second degree murder, sentence of 10 years); *State v. Harris*, Wake County Super. Ct. No. 73-Cr-76418 (February 11, 1974,

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solicitors have wanted and achieved nothing less than a

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indictment for rape; August 19, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Santor*, Wake County Super. Ct. No. 73-Cr-68725 (February 11, 1974, indictment for first degree murder; July 15, 1974, guilty plea to voluntary manslaughter, sentence of 20 years); *State v. Lacy Jones*, Wake County Super. Ct. No. 73-Cr-698 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Kenneth Jones*, Wake County Super. Ct. No. 74-Cr-697 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault with intent to inflict serious injury, sentence of 1 year); *State v. Chance*, Wake County Super. Ct. No. 74-Cr-696 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Goldston*, Wake County Super. Ct. No. 73-Cr-73020 (January 7, 1974, indictment for first degree murder; May 24, 1974, guilty plea to voluntary manslaughter, sentence of 7 to 10 years); *State v. Smith*, Wake County Super. Ct. No. 73-Cr-54092 (October 29, 1973, indictment for first degree burglary; February 25, 1974, guilty plea to breaking and entering with intent to commit larceny, sentence of 7-10 years suspended with probation); *State v. Otha Johnson*, Wake County Super. Ct. No. 73-Cr-44188 (August 30, 1973, indictment for first degree murder; April 22, 1974, guilty plea to voluntary manslaughter, sentence of 14-18 years); *State v. Wright*, Wake County Super. Ct. No. 73-Cr-41760 (August 30, 1973, indictment for rape; November 7, 1974, guilty plea to assault on a female, sentence of time served); *State v. Weatherspoon*, Wake County Super. Ct. No. 73-Cr-38571 (August 30, 1973, indictment for first degree burglary; October 12, 1973, guilty plea to felonious breaking and entering, sentence of 1-2 years); *State v. Ramos*, Wake County Super. Ct. No. 73-Cr-30623 (May 29, 1973, indictment for first degree burglary; June 4, 1973, guilty plea to non-felonious breaking and entering, sentence of 2 years suspended with 5 years probation); *State v. DeBoise*, Wake

(continued)

capital conviction and sentence.

Plea bargaining under a "mandatory" statute is frequently said to "provide the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[94] The result of this process, however, is thoroughly to vitiate the uniform operation of the statute:

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County Super. Ct. No. 73-Cr-29233 (May 29, 1973, indictment for first degree burglary; October 22, 1973, guilty plea to felonious breaking and entering, sentence of 4 years suspended with probation); *State v. Stephenson*, Wake County Super. Ct. No. 73-Cr-27254 (May 29, 1973, indictment for rape; April 29, 1974, guilty plea to assault with intent to commit rape, sentence of 10 years), *State v. Franks*, Wake County Super. Ct. No 73-Cr-20787 (April 24, 1973, indictment for rape; April 18, 1974, guilty plea to assault with intent to commit rape, sentence of 10 years); *State v. Franks*, Wake County Super. St. No. 73-Cr-15922 (April 9, 1973, indictment for first degree murder; November 26, 1973, guilty plea to voluntary manslaughter, sentence of 20 years). These cases, terminated by a guilty plea to a non-capital offense, were initiated by capital indictments returned in one of North Carolina's one hundred counties (Wake), the county in which petitioner was indicted, for offenses allegedly committed during the January 18, 1973 – April 8, 1974 period when the capital procedures mandated by *State v. Waddell* were in effect.

[94]Heath, *Plea Bargaining – Justice Off the Record*, 9 WASHBURN U. L. REV. 430, 455 (1970). *See also* NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 98 (1966):

> "[c]harge reduction offers the court an opportunity to individualize justice by distinguishing between technically similar cases in both sentence and conviction label, especially when sentencing discretion is denied by legislatively fixed terms."

> "[i]n both Michigan and Kansas, where mandatory sentences for particular crimes are common, plea negotiation not only is a widespread practice considered necessary to obtain guilty pleas but is generally accepted by both prosecution and the trial courts as desirable in situations where charge reduction is necessary to avoid overly severe sentences."[95]

Such a practice – by which some defendants indicted for capital offenses are permitted to escape with sentences less harsh than death as the result of plea negotiations conducted in the unlimited discretion of the prosecutor – may be thought necessary and proper, and it is doubtless inevitable, to achieve "individualized" and "humane" justice under the exceedingly broad range of death penalties made "mandatory" in North Carolina by *Waddell*. But in the very process of "ameliorating the severity of the more extreme punishment," *United States v. Jackson*, 390 U.S. 570, 582 (1968), it reintroduces exactly the kind of arbitrary selectivity condemned in *Furman*.[96]

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[95]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 41 (1966).

> "A major characteristic of criminal justice administration particularly in jurisdictions characterized by legislatively fixed sentences, is charge reduction to elicit a plea of guilty."

Id. at 76.

[96]Although properly supervised plea bargaining may not violate Due Process, *see Brady v. United States*, 397 U.S. 742, 750-755 (1970), the result of plea bargaining practices may nevertheless render the administration of a capital punishment statute invalid under *Furman v. Georgia*. This is so for the same reason that the approval of standardless jury sentencing under the Due Process Clause in *McGautha v. California*, 402 U.S. 183 (1971), did not imply (as the subsequent *Furman* decision made clear) that the *results* of such a procedure complied with the Eighth Amendment.

C. Jury Discretion

Despite the annulment of explicit sentencing discretion following a first degree murder conviction, a North Carolina jury still has broad license to spare the life of a capital defendant. It may do so by convicting him of a lesser homicide offense, an attempt or an assault, or by recognizing some amorphously defined defense as a justification or mitigation of the offense, as well as by acquitting him altogether in the teeth of the evidence. Although this jury discretion is less straightforward than under North Carolina's pre-*Waddell* capital procedure, it is equally selective, and its greater diffusion merely injects greater arbitrariness into the disposition of capital offenders at the trial stage.

North Carolina General Statutes § 15-170 (repl. vol. 1969) provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime. . . ."

Petitioner's jury was charged on manslaughter, second degree murder, and first degree murder (A. 69-84), thereby giving it a *de facto* sentencing power to impose any punishment from a term of four months imprisonment (N.C. Gen. Stat. § 14-18 (repl. vol. 1969)) to a "mandatory" death penalty (N.C. Gen. Stat. § 14-17 (repl. vol. 1969)). The instructions given to this jury are representative of those utilized in most cases where a defendant is charged with "premeditated and deliberated" first degree murder; and a charge on lesser included offenses is not infrequently given even in cases of first degree murder allegedly committed during a felony, *see State v. Knight*, 248 N.C. 384, 103 S.E.2d

452 (1958), or by poisoning, *see State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906). For not only is it the rule that a defendant may demand a lesser-included-offense instruction as a matter of right whenever *any* evidence could conceivably support a lesser conviction,[97] but – as we shall see below[98] – no effective restraint is imposed upon the trial judge's submission of lessers to the jury in the absence of any such evidence.

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[97] "If . . . there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." *State v. Knight*, 248 N.C. 384, 103 S.E.2d 452, 456 (1958) (quoting *State v. Spivey*, 151 N.C. 676, 65 S.E. 995, 999 (1909)); *State v. Childress*, 228 N.C. 208, 45 S.E.2d 42, 44 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, *State v. Griffin*, 280 N.C. 142, 185 S.E.2d 149, 151 (1971); *State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393, 397 (1971); *State v. Roseman*, 279 N.C. 573, 184 S.E.2d 289, 294 (1971); *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); *State v. Brown*, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); *State v. Cox*, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime, *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); *State v. Scales*, 242 N.C. 400, 87 S.E.2d 916, 921 (1955); *State v. Mays*, 225 N.C. 486, 35 S.E.2d 494, 496 (1945); *State v. Satterfield*, 207 N.C. 118, 176 S.E. 466, 467-468 (1934); *State v. Chavis*, 80 N.C. 353, 357-358 (1879). However, if a lesser-included offense charge is given in such a situation, and if a defendant is convicted of the lesser without evidentiary support, the conviction will nevertheless be affirmed on appeal. *See State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906), discussed in text at p. 78 *infra*.

[98] *See* text and notes at notes 117-119 *infra*.

The Supreme Court of North Carolina has frequently reversed convictions for capital first degree murder[99] because the trial court failed to give a charge on second degree murder,[100] voluntary manslaughter,[101] or involuntary manslaughter.[102] Indeed, the right to a lesser-included-offense charge is considered so important in

[99]The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

[100]*State v. Knight*, 248 N.C. 384, 103 S.E.2d 452 (1958); *State v. Gause*, 227 N.C. 26, 40 S.E.2d 463 (1946); *State v. Perry*, 209 N.C. 604, 184 S.E. 545 (1936); *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928). When the State attempts to prove "willful, deliberate and premeditated killing," N.C. Gen. Stat. §14-17 (repl. vol. 1969), which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. §15-172 (repl. vol. 1969), and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 158 (1965). *Cf. State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337, 341-343 (1965); *State v. Drake*, 8 N.C. App. 214, 174 S.E.2d 132, 135 (1970).

[101]*State v. Manning*, 251 N.C. 1, 110 S.E.2d 474 (1959); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617 (1924); *State v. Merrick*, 171 N.C. 788, 88 S.E. 501 (1916). *Cf. State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969).

[102]*State v. Wrenn*, 279 N.C. 676, 185 S.E.2d 129 (1971). *Cf. State v. Freeman*, 280 N.C. 622, 187 S.E.2d 59 (1972); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969).

North Carolina that its omission is held to be reversible error even when the defendant fails to request it. *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970); *State v. Wagoner*, 249 N.C. 637, 107 S.E.2d 83 (1959). *See State v. Moore*, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); *State v. DeGraffenreid*, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). Trial judges are therefore advised to err on the side of inclusion; and, once lesser-offense instructions on second degree murder and manslaughter are included in a first degree murder trial, the jury is given essentially unrestricted discretion to convict alternatively for any of the three crimes. The definitions of the respective offenses under North Carolina law do not distinguish them except in terms of vague, intangible and elusive elements that remain as intractable to objective fact-finding as they are inviting to "any amount of purely 'discretionary' decision."[103]

North Carolina General Statutes §14-17 (repl. vol. 1969) defines as murder in the first degree any

> "murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony."

It then declares second degree murder to be "[a]ll

[103]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 47 (1974).

other kinds of murder."[104] Thus, in a case like petitioner's, "[m]urder in the first degree is the unlawful killing of a human being with malice, premeditation, and deliberation." *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652, 657 (1969). *See also State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, 771-773 (1961); *State v. Payne*, 213 N.C. 719, 197 S.E. 573, 579 (1938). "Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889, 892 (1963). *See also State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 337 (1969); *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942).[105] Manslaughter is not defined by statute[106] but has been declared judicially to be "the unlawful killing of a human being without malice and without premeditation and deliberation." *State v. Kea*, 256 N.C.

[104]The crime of murder was divided into two degrees in 1893. *See* N.C. Acts 1893, ch. 85. Since this date, the common law definition of murder as an unlawful and malicious killing has been applicable only to second degree murder; and to constitute statutory first degree murder, "the killing must be 'wilful, deliberate, and premeditated.'" *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128, 129 (1899). Before 1893, "[a]ny unlawful killing of a human being with malice aforethought, express or implied, was murder and was punishable by death." *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 803 (1970).

[105]"Murder in the first degree is sometimes defined as murder in the second degree plus premeditation," *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 804 (1970).

[106]North Carolina General Statutes §14-18 (repl. vol. 1969) merely provides that the punishment for "manslaughter" shall be imprisonment "for not less than four months nor more than twenty years."

492, 124 S.E.2d 174, 175 (1962). *See also State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 72 (1967); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151 (1910).

The constituent elements that mark the lines between first and second degree murder and manslaughter are extraordinarily hazy and amorphous. "The crime of murder in the first degree is distinguished by a mental process or psychological condition none [too] . . . easy of expression." *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942). Indeed, the North Carolina Supreme Court has declared that the reason for the statutory division of murder into two degrees in 1893 was to "select . . . out of all murders denounced by the common law those deemed more heinous on account of the mode of their perpetration." *State v. Streeton*, 231 N.C. 301, 56 S.E.2d 649, 652 (1949). *See also State v. Cole*, 132 N.C. 1059, 44 S.E. 391, 393 (1903).

> "The passage of the Act of 1893 marks an era in the judicial history of the state. As far as we can ascertain, every other state had previously divided the common-law kind of murder into two classes. The theory upon which this change has been made is that the law will always be executed more faithfully when it is in accord with an enlightened idea of justice. Public sentiment has revolted at the thought of placing on a level in the courts one who is provoked by insulting words (not deemed by the common law as any provocation whatever) to kill another with a deadly weapon, with him who waylays and shoots another in order to rob him of his money, or poisons him to gratify an old grudge. So long as artificial proof of malice is allowed to raise the presumption of murder, this new law will fail to accomplish the object for which it was framed . . . . It is not the severity of

laws, but the certainty of their execution, that accomplishes the end that should be always in view in enforcing them. Heretofore public opinion has approved, and often applauded, the conduct of juries in disregarding the instructions of judges as to the technical weight to be given to the use of a deadly weapon. The consequence has been that, a lax administration of the law being tolerated in such cases, other juries have constituted themselves judges of the law as well as of the facts, when proof has shown a more heinous offense. The experience of a few years will probably demonstrate here, as elsewhere, that fewer criminals will escape under a law which is in accord with the public sense of justice than under one which makes no discrimination between offenses differing widely in the degree of moral turpitude exhibited."

State v. Fuller, 114 N.C. 885, 19 S.E. 797, 802 (1894).[107]

[107]*Cf. State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896) (emphasis in original):

"the act of 1893 says in express terms that the jury before whom the case is tried shall determine the degree of murder. And we do not understand this to mean an unbridled, arbitrary, or mob finding, any more than it was before the statute. Even before the act of 1893 we all know that it was within the *power* of the jury to acquit and turn loose a prisoner, no matter how guilty he might be, and the court was powerless. In fact, it is alleged that they often did this. But is is expected they will find the facts, and apply them to the law given by the court, determine whether the prisoner is guilty or not, and, if guilty, in what degree. We see no reason why they should act differently now to what they did before the statute, and we do not believe they are any more disposed to take the law in their own hands in deciding cases under the act of 1893 than they were before."

First degree murder is defined broadly, though vaguely:

"'[m]alice aforethought' was a term used in defining murder prior to the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade .... As used in ... G.S. § 14-17, the term 'premeditation and deliberation' is more comprehensive and embraces all that is meant by 'aforethought', and more."

State v. Hightower, 226 N.C. 62, 36 S.E.2d 649, 650 (1946).[108] The difference between first and second degree murder turns on the presence or absence of "premeditation" and "deliberation":

"[p]remeditation means 'thought beforehand for some length of time, however short.'

....

'Deliberation means that the act is done in [a] cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill,[109] executed by the defendant in a cool state of blood, in

[108]*See also State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942):

"[a]s pointed out by the Attorney General, 'aforethought is defined as "premeditated" (Century, Webster), and "premeditated" is defined as "deliberate." '"

[109]The intention to kill which is required for first degree murder, *see, e.g., State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858, 861 (1969); *State v. Stitt*, 146 N.C. 643, 61 S.E. 566, 567 (1908), is sometimes said to be merely an element of premeditation and deliberation. *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 567 (1968); *cf. State v. Gordon*, 241 N.C. 356, 85 S.E.2d 322, 324 (1955).

furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.' "

State v. Reams, 277 N.C. 391, 178 S.E.2d 65, 71 (1970) (quoting *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922)). *See also State v. Fountain*, 282 N.C. 58, 191 S.E.2d 674, 683 (1972); *State v. Benson*, *supra*. " 'No fixed length of time is required for the mental processes of premeditation and deliberation . . . and it is sufficient if these processes occur prior to, and not simultaneously with, the killing,' " *State v. Perry*, 276 N.C. 339, 172 S.E.2d 541, 547 (1970) (quoting 4 STRONG, NORTH CAROLINA INDEX 196 (2d ed. 1958)). The determination whether "premeditation" and "deliberation" exist is necessarily given over almost entirely to the intuition of the jury[110] because these elements "are not usually susceptible of direct proof, and are therefore susceptible of proof by

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"The line which separates felonious homicides committed . . . without premeditation, from those accompanied by the additional mental condition called 'premeditation,' is shadowy and difficult to fix. The law cannot safely prescribe any uniform and universal rule in regard thereto. As in questions of negligence and the like, it can only define the term, and submit the question of its existence to the jury. It is well settled that the state of mind, intent, sanity, etc., is always a question of fact for the jury."

State v. Daniels, 134 N.C. 671, 46 S.E. 991, 993 (1904). *See also* note 111 *infra*.

circumstances from which the facts sought to be proved may be inferred." *State v. Walters*, 275 N.C. 615, 170 S.E.2d 484, 490 (1969).

"Malice," the factor that separates murder from manslaughter, is equally a matter of inference – and often of inference (or presumption) from the same basic facts that might support the jury's inference of premeditation and deliberation.[111]

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[111] *See, e.g., State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393, 398-399 (1971) (alternative ground), and cases cited.

For example, the North Carolina cases say that malice is "implied" (*see State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922), quoted in text pp. 72-74 *infra; and see, e.g., State v. Payne*, 213 N.C. 719, 197 S.E. 573, 579 (1938); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 421 (1910); *State v. McDowell*, 145 N.C. 563, 59 S.E. 690, 692 (1907)) or "presumed" (*see State v. Sparks*, ____ N.C. ____, 207 S.E.2d 712, 719 (1974); *State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337, 341 (1965)) whenever the defendant's intentional discharge of a deadly weapon results in death. This principle plainly involves an evidentiary presumption that throws upon the defendant the burden of proving (either through the presentation of evidence or through the appearance of mitigating circumstances in the State's case, *e.g., State v. Vann*, 162 N.C. 534, 77 S.E. 295, 298 (1913)) that a killing with a firearm was non-malicious. *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 599-600 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 464 (1969); *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875, 876 (1943), and cases cited. Whether it also means that the prosecution is always entitled to a second degree murder submission in a case where the defendant is armed with a firearm is unclear. *State v. Downey*, 253 N.C. 348, 117 S.E.2d 39, 43 (1960), implies this conclusion, although earlier cases suggest the contrary. *See State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151-152 (1910); *State v. Miller*, 112 N.C. 878, 17 S.E. 167, 168-169 (1893).

(continued)

"Malice is not only hatred, ill will or spite, as it is

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Since *State v. Fuller*, 114 N.C. 885, 19 S.E. 797 (1894), the North Carolina Supreme Court has consistently iterated the rule that premeditation and deliberation – unlike malice– are *not* "presumed" from an intentional discharge of a deadly weapon resulting in death. *E.g., State v. Reams*, 277 N.C. 391, 178 S.E.2d 65, 71 (1970). As expressed in *Fuller*, this doctrine seemed to forbid a permissive inference, as well as a presumption, of premeditation and deliberation. However, later expressions of the *Fuller* rule speak only of the impropriety of a "presumption," *see e.g., State v. Reams, supra*, 178 S.E.2d at 71; *State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, 772 (1961); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188, 190 (1950); *State v. Bowser*, 214 N.C. 249, 199 S.E. 31, 33 (1938); *State v. Miller*, 197 N.C. 445, 149 S.E. 590, 592 (1929); *cf. State v. Booker*, 123 N.C. 713, 31 S.E. 376, 380 (1898), and of the shift of the burden of proof which a true presumption implies, *cf. State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 566-568 (1968). Collateral doctrinal developments have undercut the notion that an *inference* of premeditation and deliberation may not be drawn from intentional use of a deadly weapon: "[p]remeditation and deliberation are not usually susceptible to direct proof but must be established from the circumstances surrounding the homicide." *State v. Sanders*, 276 N.C. 598, 174 S.E.2d 487, 499 (1970), *rev'd on other grounds*, 403 U.S. 948 (1971); *see also State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974); *State v. Evans*, 198 N.C. 82, 150 S.E. 678, 679-680 (1929); *State v. Hamilton*, 19 N.C. App. 436, 199 S.E.2d 159, 160 (1973). The jury is to determine premeditation and deliberation from " 'all the attendant circumstances' " under which the homicide is committed, *State v. Bowser*, 214 N.C. 249, 199 S.E. 31, 34 (1938), including "the manner of the killing, [the defendant's] ... acts and conduct attending its commission," *State v. Robertson*, 166 N.C. 356, 81 S.E. 689, 692 (1914); any "vicious and brutal circumstances," *State v. Duboise*, 279 N.C. 73, 181

(continued)

ordinarily understood – to be sure that is malice

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S.E.2d 393, 399 (1971); and the "use of grossly excessive force," *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974) (quoting *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539, 545 (1973)). "[P]remeditation and deliberation may be inferred from a vicious and brutal slaying of a human being." *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65, 71 (1970). Thus, it is no surprise that the North Carolina Supreme Court has abandoned its early occasional practice of reversing first degree murder convictions (*see State v. Cole*, 132 N.C. 1069, 44 S.E. 391 (1903); *State v. Bishop*, 131 N.C. 733, 42 S.E. 836 (1902) (alternative ground); *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899); *State v. Thomas* 118 N.C. 1113, 24 S.E. 431 (1896) (alternative ground)) for insufficiency of evidence of premeditation and deliberation. Not since 1903 has a North Carolina appellate court held evidence insufficient to permit a finding of premeditation and deliberation, and therefore to support a first degree murder conviction – even though reversals for insufficient evidence of matters such as identity are common, *e.g., State v. Poole*, 285 N.W. 108, 203 S.E.2d 786 (1974) (capital burglary); *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971) (second degree murder). Numerous cases sustain first degree murder verdicts where virtually nothing more than an unprovoked killing with a deadly weapon was established by the prosecution. *See, e.g., State v. Perry*, 276 N.C. 339, 172 S.E.2d 541 (1970); *State v. Old*, 272 N.C. 42, 157 S.E.2d 651 (1967); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188 (1950); *State v. Matheson*, 225 N.C. 109, 33 S.E.2d 590 (1945); *State v. Hammonds*, 216 N.C. 67, 3 S.E.2d 439 (1939); *State v. Walker*, 173 N.C. 780, 92 S.E. 327 (1917); *State v. Ferguson*, 17 N.C. App. 367, 194 S.E.2d 217 (1973).

The upshot, then, is that, in all but perhaps the rarest case of a killing by a defendant armed with a deadly weapon, no judicial control is exercised over the power of the jury to convict of any offense from manslaughter through first degree murder. The jury may or may not infer premeditation and deliberation from the same evidence which gives rise to the presumption of malice; and it may or may not find that presumption overcome to its "satisfaction" (*see* pp. 82-83 *infra*) by evidence of mitigation.

– but it also means that condition of mind which prompts a person to take the life of another without just cause, excuse or justification . . . . It may be shown by evidence of hatred, ill will, or dislike, and it is implied in law from the killing with a deadly weapon. . . ."

State v. Benson, 183 N.C. 795, 111 S.E. 869, 871 (1922).[112] *See also State v. Foust*, 258 N.C. 453, 128 S.E.2d 889, 893 (1963); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151 (1910); *State v. Tilley*, 18 N.C. App. 300, 196 S.E.2d 816, 818 (1973).

Definitions of this kind allow a jury almost complete freedom to return a capital or non-capital verdict not only upon the same evidence but upon the same factual interpretation of the evidence, finding or declining to find "premeditation," "deliberation" or "malice" in accordance with the desired sentencing consequences. To recognize this obvious truth is not to impugn the fidelity of jurors to their oaths but only to acknowledge that they are human. *See Jackson v. Denno*, 378 U.S. 368, 388-389 (1964). Legal formulations spelling the difference between life and death in terms that are "refractory to the best-instructed human understanding"[113] do not merely permit – they imperatively require – the exercise of non-objective, non-factual, discretionary judgments and "the play of . . . prejudices."[114] "[I]n a great many close cases, no matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve laypersons have no alternative to using their general sense of the equities of the matter."[115] Long ago, Justice (then Chief Judge) Cardozo recognized that the obscure distinctions between capital and non-capital grades of homicide – in particular, the concept of premeditation and deliber-

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[112]Proof of a fight between the decedent and the defendant or threats uttered by the decedent to the defendant is often sufficient to negate the inference of malice. *See, e.g.*, the following cases in which defendant was convicted of manslaughter: *State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 70-72 (1967); *State v. Camp*, 266 N.C. 626, 146 S.E.2d 643, 644-645 (1966); *State v. Suddreth*, 230 N.C. 239, 52 S.E.2d 924, 925 (1949); *State v. Church*, 229 N.C. 718, 51 S.E.2d 345, 346 (1949); *State v. Beachum*, 220 N.C. 531, 17 S.E.2d 674, 675 (1941); *State v. Bright*, 215 N.C. 537, 2 S.E.2d 541, 542 (1939); *State v. Reynolds*, 212 N.C. 37, 192 S.E. 871, 871 (1937); *State v. Baldwin*, 184 N.C. 789, 114 S.E. 837, 838 (1922); *State v. Yates*, 155 N.C. 450, 71 S.E. 317, 317-318 (1911). However, a verdict of second degree murder is often affirmed in cases arising out of similar factual circumstances. *See, e.g.*, the following cases in which defendant was convicted of second degree murder; *State v. Cole*, 280 N.C. 398, 185 S.E.2d 833, 833-834 (1972); *State v. Feaganes*, 272 N.C. 246, 158 S.E.2d 89, 89-90 (1967); *State v. Barber*, 270 N.C. 222, 154 S.E.2d 104, 105-107 (1967); *State v. Morgan*, 245 N.C. 215, 95 S.E.2d 507, 507-508 (1956); *State v. Wingler*, 238 N.C. 485, 78 S.E.2d 303, 305-306 (1953); *State v. Russell*, 233 N.C. 487, 64 S.E.2d 579, 580 (1951); *State v. Taylor*, 226 N.C. 286, 37 S.E.2d 901, 901-902 (1946); *State v. Brinkley*, 183 N.C. 720, 110 S.E. 783, 785-786 (1922); *State v. Gentry*, 125 N.C. 733, 34 S.E. 706, 706-707 (1899); *State v. Rummage*, 19 N.C. App. 239, 193 S.E.2d 475 (1972).

[113]Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 299 (1971).

[114]*Furman v. Georgia, supra*, 408 U.S. at 242 (concurring opinion of Mr. Justice Douglas).

[115]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

ation – amounted largely to an indirect "dispensing power" of mercy:

> "... the distinction [between first and second degree murder] is much too vague to be continued in our law .... [t]he statute is framed along the lines of a defective and unreal psychology.... What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death."[116]

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[116]CARDOZO, LAW AND LITERATURE 99-101 (1931). To speak of a "dispensing power," of course, is to describe only the benign half of what juries do when they "answer 'yes' or 'no' to the question whether this defendant was fit to live," *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968). A "yes" answer, "like the decision of the prosecutor to accept a plea of guilty in the plea-bargaining process, sounds good; somebody escapes death. The trouble is that if you turn the coin around, somebody else *suffers* death because the jury did *not* find him guilty of a lesser offense rather than of the capital charge. And if the jury's *milder* verdict may be a function of its sympathies, then its *sterner* verdict, by inevitable logic, may be a function of its *lack* of sympathy." BLACK, CAPITAL PUNISHMENT, THE INEVITA-

(continued)

We have already seen that the "privilege" described by Justice Cardozo "to find the lesser degree" must be afforded to the jury under North Carolina law when there is "any evidence, or ... any inference ... therefrom"[117] of an unpremeditated or a non-malicious killing, within the vague contours of those unilluminating terms. But even that is not the whole story of the trial judge's or the jury's discretion in regard to lessers. For in North Carolina, a jury may also be charged on a lesser included offense where there is *no* evidence to

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BILITY OF CAPRICE AND MISTAKE 47 (1974) (emphasis in original).

Although it seems superfluous to make this point after *Furman*, we may note that the oft-quoted passage in *Witherspoon v. Illinois, supra*, regarding the jury's function in maintaining "a link between contemporary community values and the penal system," 391 U.S. at 519 n.15, did not state or imply the propriety of a system under which different juries decided whether different defendants were fit to live or die according to the particular reflection of community values fortuitously mirrored by the particular jury. The *Witherspoon* passage rather carefully states that, *where a legislature has left the life-or-death sentencing choice to be made by juries without any guiding principles, preferences or standards*, the juries' function is to reflect community attitudes regarding the death penalty – with the consequence that the reflection may not be distorted by improper jury-selection practices. The "where" clause in this analysis is a description of Illinois law (not challenged in *Witherspoon*): it is not a prescription for desirable or constitutional jury performance.

[117]*State v. Knight*, 248 N.C. 384, 103 S.E.2d 452, 456 (1958), quoted more fully in note 97 *supra*.

support such a charge, and a conviction for the lesser offense will be sustained on appeal.[118] *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970); *State v. Robertson*, 210 N.C. 266, 186 S.E. 247 (1936); *State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917). In *State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In *State v. Quick*, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "[s]uppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder,

[118] The Supreme Court of North Carolina has occasionally disapproved of this practice, *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); *State v. Bentley*, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

> what right has the defendant to complain? It is an error prejudicial to the state, and not to him."[119]

In *State v. Bentley*, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "[i]f we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

The jury has the further statutory power in felony cases to find a defendant guilty of either an attempt to commit the crime charged in the indictment or an assault with intent to commit that crime. North Carolina General Statutes § 15-170 (repl. vol. 1969) provides:

[119] "An error on the side of mercy is not reversible . . . ." *State v. Fowler*, 151 N.C. 731, 66 S.E. 567, 567 (1909). *Accord: State v. Rowe*, 155 N.C. 436, 71 S.E. 332, 337 (1911). *See also State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 466 (1969); *State v. Johnson*, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); *State v. Hall*, 214 N.C. 639, 200 S.E. 375, 377 (1939); *State v. Ratliff*, 199 N.C. 9, 153 S.E. 605, 606 (1930).

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein . . . or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

And N.C. Gen. Stat. § 15-169 (repl. vol. 1969) provides that:

> "[o]n the trial of any person for . . . any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

Failure of the trial court to instruct the jury on attempt or assault may be reversible error. *State v. Williams*, 185 N.C. 685, 116 S.E. 736 (1923).[120]

Additional avenues for avoidance of a "mandatory" death penalty for first degree murder are provided by the power of North Carolina juries to allow a variety of indefinitely defined defenses, justifications and mitigations to the capital charge. These include the complete defenses of self-defense (or defense of others), *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 829 (1938), and insanity, *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241, 256-257 (1969); provocation and passion, *State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 503

[120] *See also State v. Green*, 246 N.C. 717, 100 S.E.2d 52, 53-54 (1957); *State v. Roy*, 233 N.C. 558, 64 S.E.2d 840, 841 (1951); *State v. Webb*, 20 N.C. App. 199, 200 S.E.2d 840, 841 (1973). *Cf. State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 116–118 (1972) (dissenting opinion of Mr. Chief Justice Bobbitt). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." *State v. Green*, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

(1916); *State v. Johnson*, 23 N.C. 354, 359, 362 (1840); and "imperfect" self-defense, *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 836 (1922), which serve to reduce murder to manslaughter – doctrines of particular significance because "every practitioner, who has had any experience in the trial of capital cases, knows how prone juries are to compromise a capital case upon the middle ground of manslaughter," *State v. Brittain*, 89 N.C. 481, 501 (1883); and intoxication, which may avert at least a conviction of murder in the first degree, *State v. Hammonds*, 216 N.C. 67, 3 S.E.2d 439, 446-447 (1939). Each of these doctrines involves an "affirmative" defense which the jury may or may not choose to accept upon the evidence urged by the defendant to support it; each requires largely subjective judgments by jurors in the application of principles of the greatest vagueness and imprecision;[121] and the

[121] The contours of each North Carolina doctrine mentioned above are described in the following paragraphs, with the exception of insanity. Concerning the implications of the insanity defense as a means of avoiding capital punishment, see BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 50-55 (1974). North Carolina employs the traditional M'Naghten test of legal insanity, *State v. Humphrey*, 283 N.C. 570, 196 S.E.2d 516, 518-519 (1973), whose amorphousness is notorious, *see, e.g.*, GOLDSTEIN, THE INSANITY DEFENSE 44-66 (1967). And two ancillary North Carolina doctrines effectively consign the insanity defense to the complete discretion of the jury. First, the quantum of evidence suggesting mental abnormality which is ordinarily necessary to raise the issue for the jury's consideration is extremely small, *cf. State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241, 256–257 (1969), *rev'd on other grounds*, 403 U.S. 948 (1971); *State v. Harris*, 223 N.C. 697, 28 S.E.2d 232, 237 (1943), except, perhaps, where the nature of the testimony is not directed to the M'Naghten issue, *see State v. Helms*, 284 N.C. 508, 201 S.E.2d 850, 852-853 (1974). Second, the burden of proof upon the issue is the "satisfaction of the jury" test (*see* pp. 82-83 *infra*), and "[t]he jury alone is the judge of its satisfaction." *State v. Harris, supra*, 28 S.E.2d at 237-238.

peculiar North Carolina burden of proof on these issues – evidence "sufficient to satisfy" the jury – explicitly invites the making of those judgments in a wholly discretionary, non-objective manner.

> "[The North Carolina] cases enunciate and reiterate the rule – established in our law for over one hundred years, *State v. Willis*, 63 N.C. 26 (1868) – that when the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – *but simply to the satisfaction of the jury*. Even proof by the greater weight of the evidence – a bare preponderance of the proof – may be sufficient to satisfy the jury, and the jury alone determines by what evidence it is satisfied."

State v. Freeman, 275 N.C. 662, 170 S.E.2d 461, 464 (1969) (emphasis in original).[122] "[T]he intensity of the

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[122]*See also State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 599-600 (1973); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235, 242 (1972); *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794, 797 (1971); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423, 428 (1971); *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 333 (1969); *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 158 (1965); *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875, 876 (1943); *State v. Meares*, 222 N.C. 436, 23 S.E.2d 311, 312 (1942); *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922); *State v. Carland*, 90 N.C. 668, 674-675 (1884); *State v. Calloway*, 1 N.C. App. 150, 160 S.E.2d 501, 503 (1968); *State v. Richardson*, 14 N.C. App. 86, 187 S.E.2d 435, 437 (1972); *and see State v. Barrett*, 132 N.C. 1005, 43 S.E. 832, 833 (1903) (disapproving instructions that an affirmative defense must be established by the "greater proof" or "stronger proof").

> proof required to 'satisfy the jury' . . . cannot be defined by the court as being 'less than,' 'the same as,' or 'more than' the greater weight of the evidence or the preponderance of the evidence," STANSBURY, NORTH CAROLINA EVIDENCE § 214 (2d ed. 1963), because "the jury alone is the judge" of what satisfies it, *State v. Prince*, 223 N.C. 392, 265. E.2d 875, 876 (1943). Therefore, the " 'accepted formula *and the one that should be used if risk of error is to be avoided*, is that the defendant has the burden of proving his defense (or mitigation) "to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – but simply to the satisfaction of the jury." ' " *State v. Freeman, supra*, 170 S.E.2d at 464 (quoting **STANSBURY**, *op. cit. supra* (emphasis in opinion)).
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> The elements of which the jury must be thus "satisfied" are characteristically impressionistic. In assessing petitioner's claim of self-defense, for example, his trial jurors were called upon to decide whether, at the time of the incident with a man who had beaten him bloody that afternoon, petitioner had a "reasonable" apprehension of the necessity to kill in order to avoid suffering death or great bodily harm. *See State v. Watkins*, 283 N.C. 504, 196 S.E.2d 750, 754 (1973); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24, 27 (1968); *State v. Johnson*, 270 N.C. 215, 154 S.E.2d 48, 52 (1967); *State v. Fowler*, 250 N.C. 595, 108 S.E.2d 892, 894 (1959); *State v. Bryant*, 213 N.C. 752, 197 S.E. 530, 533 (1938); *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 828 (1938). The application of this principle in the context of a case where the defendant seeks to prove that a prior fight with the decedent was

resumed just before the killing obviously presents peculiar difficulties. *See State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910).

> "[O]ne may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief."

State v. Marshall, 208 N.C. 127, 179 S.E. 427, 428 (1935).[123] *See, e.g., State v. Gladden*, 279 N.C. 566, 184 S.E.2d 249, 253 (1971); *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 159 (1965). However, the defendant must not have been the "aggressor," *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 601 (1973) – a notion apparently involving concepts of relative "fault"[124] – and he must have "used no more force

[123] The *Marshall* case is frequently cited as the leading modern exposition of the law of self-defense in North Carolina. A more recent summary is found in *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 600-601 (1973). *See also State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450-453 (1970); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24, 26-29 (1968); *State v. Goode*, 249 N.C. 632, 107 S.E.2d 70, 71-72 (1959); *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832, 832-835 (1903).

[124] The North Carolina cases abound with statements that, in order to prevail on a claim of self-defense, a defendant must have been "without fault" in provoking the assault against which he defends. *See, e.g., State v. Watkins* 283 N.C. 504, 196 S.E.2d 750, 755 (1973); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423, 429-431 (1971); *State v. Wynn*, 278 N.C. 513, 180 S.E.2d 135, 139 (1971); *State v. Johnson*, 278 N.C. 252, 179 S.E.2d 429, 432 (1971); *State v. Davis*, 225 N.C. 117, 33 S.E.2d 623, 624

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than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm," *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794, 797 (1971). The use of "excessive force" defeats a claim of self-defense;[125] but one who uses excessive force may nevertheless prevail upon the partial defense of *imperfect* self-defense, which reduces murder – even by an intentional killing – to manslaughter, *State v. Rummage*, 280 N.C. 51, 185 S.E.2d 221, 225 (1971);

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(1945); *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 828-830 (1938); *State v. Blevins*, 138 N.C. 668, 50 S.E. 763, 764 (1905). In *State v. Crisp*, 170 N.C. 785, 87 S.E. 511 (1916), the North Carolina Supreme Court refined the fault concept (" 'a perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his actions,' " 87 S.E. at 514) by recognizing degrees of fault: if a defendant begins an affray with the intention of inflicting great bodily harm, his right of self-defense is lost and the killing is murder; but if he begins or provokes the affray with some lesser assault or verbal abuse, his right of self-defense is rendered "imperfect," *ibid.*, and he is guilty of manslaughter. The *Crisp* principle, turning the right of self-defense upon moral blame-worthiness, has deep roots in North Carolina law. *See, e.g., State v. Chavis*, 80 N.C. 353, 358 (1879); *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888).

[125] *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 601 (1973). *See also, e.g., State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 72 (1967); *State v. McDonald*, 249 N.C. 419, 106 S.E.2d 477, 478 (1959); *State v. Mosley*, 213 N.C. 304, 195 S.E. 830, 832 (1938); *State v. Terrell*, 212 N.C. 145, 193 S.E. 161, 164 (1937); *State v. Marshall*, 208 N.C. 127, 179 S.E. 427, 428 (1935); *State v. Glenn*, 198 N.C. 79, 150 S.E. 663, 664 (1929); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 422 (1910).

State v. Wynn, 278 N.C. 513, 180 S.E. 2d 135, 139 (1971); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305, 309 (1968); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617, 619 (1924); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 422 (1910). *See also State v. Woods*, 278 N.C. 210, 179 S.E.2d 358, 363 (1971); *State v. Kamey*, 273 N.C. 325, 160 S.E.2d 56, 59 (1968). Moreover, one who kills under the impulse of an *unreasonable* fear of death or serious bodily harm may also claim imperfect self-defense, reducing murder to manslaughter. *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 836-837 (1922);[126] *and see State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450 (1970).

Another partial defense that may result in a manslaughter verdict is provocation and passion. The North Carolina version of this doctrine is complex. Provocation alone (isolated from the passion that it may arouse) is held not to preclude malice but only to rebut the presumption of malice arising from an intentional killing with a deadly weapon. *State v.*

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[126]In addition to the "excessive force" and "unreasonable fear" varieties of imperfect self-defense, North Carolina law recognizes other situations in which a killing may be nonmalicious, and hence merely manslaughter, because the defendant's use of deadly force was self-protective although not legally justifiable under the doctrines pertaining to self-defense. *See State v. Finch*, 177 N.C. 599, 99 S.E. 409, 414 (1919); *State v. Yarborough*, 8 N.C. 78, 85 (1820). One such situation is the permutation of the "aggressor" doctrine described in note 124 *supra*. Another is the situation in which the defendant fails to comply with the "safe-retreat" requirement for perfect self-defense. *See State v. Garland*, 138 N.C. 675, 50 S.E. 853, 854-855 (1905); *cf. State v. Johnson*, 23 N.C. 354, 364 (1840).

Johnson, 23 N.C. 354, 359 (1840). Passion aroused by provocation, on the other hand, is said to be legally exclusive of malice: "[i]n law they cannot co-exist." *Id.* at 362. The psychological explanation offered by the early cases is that passion renders an individual heedless of the dictate of reason not to kill. *See State v. Hill*, 20 N.C. 491, 496 (1839); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151-152 (1910). But even from the outset the doctrine has been seen as an "indulgence of the law," *State v. Hill, supra*, 20 N.C. at 496, "a condescension to the frailty of the human frame," *ibid.* "In mitigating the offence to manslaughter where death ensues upon a sudden rencounter of this sort, the law shews its indulgence to that frailty of human nature which urges men, before they have an opportunity for reflection, to a compliance with those common notions of honour which forbid either to give way to, or acknowledge the superior prowess of, the other." *State v. Jarrott*, 23 N.C. 76, 85 (1840). *See also State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 503 (1916). As might be expected of a moralistic conception of this nature, its rules are fine-spun and casuistic. The North Carolina Supreme Court has declared that " ' "passion" means any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection' . . . . 'Passion is not limited to rage, anger, or resentment. It may be fear, terror, or, according to some decisions, "excitement" or "nervousness," ' " *State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450 (1970). Passion must spring from provocation, *State v. Carter*, 76 N.C. 20, 22-23 (1877); "slight" provocation is insufficient, *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888); *see*

State v. Keaton, 206 N.C. 682, 175 S.E. 296, 298 (1934); the provoking conduct must in theory "amount to an actual or threatened assault," *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922); *see also State v. Mosley*, 213 N.C. 304, 195 S.E. 830, 832-833 (1938).[127] North Carolina appellate courts have managed to remain within these rules with only a little straining;[128] but trial courts and juries have ignored them entirely.[129] Passion is sometimes said to be synonymous with "heat of blood," *State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 449 (1970); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305, 309 (1968); but then again it is said that " 'cool state of blood' does not mean the absence of passion and emotion . . . ." *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974). The sum of the doctrine is to make murder or

[127]The provoking conduct need not, however, amount to a felonious assault, *State v. Will*, 18 N.C. 121, 169 (1834), and it need not have threatened the defendant's life, *State v. Sizemore*, 52 N.C. 206, 209 (1859).

[128]*See, e.g., State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910) (unlawful arrest by the victim who "shoved" the defendant held adequate provocation); *State v. Briggs*, 20 N.C. App. 368, 201 S.E.2d 580 (1974) (victim's actions of breaking defendant's car window and inserting the upper part of his body into the car held adequate provocation).

[129]*See, e.g., State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969) (victim threatened defendant, ran away, returned with his hand in his pocket; defendant who shot victim convicted of manslaughter); *State v. Phillips*, 262 N.C. 723, 138 S.E.2d 626 (1964) (victim opened door of car containing defendant and woman friend; defendant who shot victim convicted of manslaughter).

manslaughter liability depend essentially upon the jury's empathy with the defendant on trial:

> "reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment."

State v. Merrick, 171 N.C. 788, 88 S.E. 501, 503 (1916) (quoting *Maher v. People*, 10 Mich. 212, 220 (1862)).[130]

These several doctrines, of course, do not exhaust the non-capital options available to petitioner's jury. Jurors in his case or like cases, applying legal principles that leave the widest latitude for subjective judgment and the "natural human tendency to see facts and to evaluate evidence in a manner leading to a desired conclusion,"[131] might have returned verdicts ranging

[130]Provocation may also be held inadequate where the defendant's response is disproportionately severe. *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888); *State v. Chavis*, 80 N.C. 353, 358 (1879); *State v. Curry*, 46 N.C. 280, 287 (1854). *Cf. State v. Gooch*, 94 N.C. 987, 1010 (1886).

[131]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 46 (1974).

from second degree murder[132] to acquittal,[133] in order

[132]Alcohol was implicated in petitioner's case (A. 14-15, 28-29, 52, 54), as it is in so many homicide cases. *See* WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 165-166, 323 (1966). Its involvement required consideration by the jury on the question of the premeditation and deliberation requisite for a capital, first degree murder conviction.

> "... [W]hether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. 'No inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law.' State v. Murphy, 157 N.C. 614, 619, 72 S.E. 1075, 1077. '[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree.'"

State v. Hamby, 275 N.C. 674, 174 S.E.2d 385, 387 (1970). *See also State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65, 69-70 (1972); *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526, 532-533 (1970); *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 567-568 (1968); *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473, 474-475 (1965); *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 321 (1942).

[133]Jury acquittals motivated solely to evade "mandatory" death sentences are an historical commonplace in the administration of "capital" justice. *See, e.g., State v. Fuller*, 114 N.C. 885, 19 S.E. 797, 802 (1894), quoted in text at pp. 67-68, *supra; State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896), quoted in note 107, *supra*; Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. Rev. 1009, 1102 n.18 (1953); Note, *The Two–Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50, 52 (1964); ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 2-3 (Center for Studies in Criminal Justice, 1968); Smith, *Capital Punishment*, 59 ALBANY L.J. 232, 241 (1899); Shipley, *Does Capital Punishment Prevent Convictions?* 43 AM. L. REV. 321 (1909).

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to avoid the death penalty. The inevitable propensity of

In *McGautha v. California*, 402 U.S. 183 (1971), this Court noted the "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers," *id.* at 198, and the fact that "jurors on occasion took the law into their own hands in [murder] cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense," *id.* at 199. *See also Andres v. United States*, 333 U.S. 740, 753 (1948) (concurring opinion of Justice Frankfurter); KALVEN & ZEISEL, THE AMERICAN JURY 306-312 (1966); Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. REV. 32 (1974). *Cf.* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT ¶¶ 27-29 (H.M.S.O. 1953) [Cmd. 8932]; 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 154-160 (1948). "[B]y far the most pronounced argument in favor of ending mandatory death penalties, echoed on every side, was the extreme difficulty of obtaining convictions in cases where a conviction is tantamount to a death sentence." BEDAU, THE DEATH PENALTY IN AMERICA 27 (rev. ed. 1967). This fact is cited by scholars as a reason for a particular jurisdiction's shift from a mandatory to a discretionary system of death sentencing or for a decline in a jurisdiction's conviction rate. *See, e.g., The Death Penalty in the United States*, 9 GREENBAG 129 (1897) (New York); McCafferty, *Major Trends in the Use of Capital Punishment*, 25 FED. PROB. (No. 3) 15 (1961) (District of Columbia); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 28-31 (1965) (New Jersey); Phelps, *Rhode Island's Threat Against Murder*, 18 J. CRIM. L. & CRIM. 552 (1928) (Rhode Island); Bennett, *A Historic Move: Delaware Abolishes Capital Punishment*, 44 A.B.A.J. 1053 (1958), and

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any "mandatory" death-sentencing regime to produce this sort of selective evasion by juries is, of course, enhanced when the death penalty is made "mandatory" for a broad range of offenses including all first degree

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Bennett *Delaware Abolishes Capital Punishment*, 49 J. CRIM. L., CRIM. & POL. SCI. 156 (1958) (Delaware).

Cf. Wicker, "Christmas on the New Death Row," N. Y. Times, Dec. 25, 1973, at 18, col. 1:

> "Raleigh, N.C. Dec. 24 ... In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; ... Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

murders, rapes, first degree burglaries and arsons.[134] It is encouraged, and all but explicitly condoned, by the North Carolina Supreme Court's ruling – which appears to have no other purpose or effect than to invite the exercise of jury discretion – that capital jurors may be informed of the consequences of their supposedly "mandatory" verdict and its alternatives. *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974). There, the court held that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence ... sufficient compelling reason exists to justify [the trial judge's] ... informing the jury of the consequences of their possible verdicts." 204 S.E.2d at 828. The court additionally ruled that "[c]ounsel may, in his argument to the jury, in any

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[134]Indeed, there is evidence that North Carolina adopted a discretionary form of capital sentencing in order to avoid unwarranted acquittals for these crimes by juries who did not want to see sympathetic defendants executed. In 1949, the Special Commission for the Improvement of the Administration of Justice in North Carolina reported that:

> "[o]nly three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, though guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. [A discretionary death penalty] ... is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases."

15 POPULAR GOVERNMENT 13 (January, 1949). A discretionary capital sentencing procedure was adopted shortly thereafter. *See also State v. McMillan*, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. . . ." The defense attorney is not forbidden, "in his argument to the jury [to] . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." *Id.* at 829.

The manner in which juries function in capital cases – particularly when they are told explicitly what is at stake – has been judicially noticed by the Supreme Court of North Carolina[135] and cannot realistically be ignored by this Court.[136] We venture to say that not a year passes when the certiorari process does not present a multitude of cases, rationally undifferentiable from petitioner's, in which a jury has returned a verdict of second degree murder or less. An altercation in a bar – a separation and renewed meeting of the combatants – some alcohol – a gun: the ingredients are tragically common. They form the backdrop of innumerable killings, crimes whose gravity no one can doubt, but which differing juries have immemorially treated as manslaughter, second degree murder, or first degree murder upon grounds that can only be described as inscrutable. The law reports of North Carolina are full of such cases where the verdict was less than first degree.[137] Spectroscopic color-matching of particular

[135] *State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896), quoted in note 107 *supra; State v. Fuller*, 114 N.C. 885, 19 S.E. 797, 802 (1894), quoted in text at pp. 67-68, *supra; State v. Brittain*, 89 N.C. 481, 501 (1883), quoted in text at p. 81, *supra.*

[136] *Cf. Watts v. Indiana*, 338 U.S. 49, 52 (1949) (plurality opinion of Mr. Justice Frankfurter).

[137] We collect some of the cases in Appendix C, pp. 1c-4c *infra.*

cases with petitioner's undoubtedly discloses all of the more or less subtle differences of which the multifariousness of human existence is made. But it is impossible to read any number of these cases and deny the purely discretionary character of the jury judgments they reflect.

D. Executive Clemency

The North Carolina Constitution provides that:

> "[T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons."

Article III, § 5(6). Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of 235 out of a total of 358 condemned prisoners were commuted.[138] The chief executive thus commuted 65.6% of North Carolina death sentences over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature only the right to prescribe the "manner of applying for pardons;" otherwise, the Governor may grant or deny clemency as he chooses, subject to "such conditions as he may think proper."

[138] Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 192 (1964). *See* notes 146, 147 *infra.*

The North Carolina Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> "[i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable."

Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

This conception of executive clemency is, of course, widespread; but it may be noted that the authority of the Governor of North Carolina in its exercise is less encumbered than that of the governors of many States. Several of the States which retain the death penalty have chosen to place some or all of the authority to make the clemency decision in the hands of a pardon board or executive council,[139] while others require periodic reports to legislative bodies on the exercise of executive clemency,[140] open hearings,[141] preparation of reasoned decisions on each application,[142] or, in certain kinds of cases, the advice of judicial authorities.[143] The

[139]*See, e.g.*, Conn. Gen. Stat. Rev. § 18-24a (1970); Idaho Const. art. 4, § 7; Utah Code Ann. § 77-62-2 (1968); Neb Const. art. 4, § 13.

[140]*See, e.g.*, N. Y. Const. art. 4, § 4; Ark. Code Ann. § 41-4714 (1973 supp.).

[141]*See, e.g.*, Idaho Const. art. 4 § 7; Neb. Const. art. 4, § 13; Pa. Const. art. 4, § 9.

[142]*See, e.g.*, Del. Const. art. 7, § 1; Utah Const. art. 7, § 12.

[143]*See* California Const. art 5, § 8 (1974 West cum. supp.).

North Carolina procedure requires none of these things.[144]

Under laws providing for a "mandatory" death penalty, grants of clemency have been considerably more frequent than under procedures giving juries explicit discretion to sentence convicted capital defendants to life or death. A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations of death sentences after the 1941 and 1949 statutory amendments which enabled juries to impose sentences of either life imprisonment or death for the four crimes that had theretofore carried "mandatory" death penalties.[145] A 1973 report on the history of the death

[144]North Carolina has, however, adopted the practice of announcing reasons for the grant, but not for the denial, of executive clemency. Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 158 (1964).

[145]Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165, 166-167 (1957). A study of the history of the death penalty in New Jersey also found evidence that clemency is afforded more frequently under a "mandatory" system than under a discretionary system. *See* Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (19 4). During the years when the death penalty was mandatory (1907-1915), there were 42 executions and 11 death sentences commuted, a ratio of 11/42 or 26.2%. *Id.* at 10. However, during the years 1916-1960, when a discretionary system of capital punishment was in effect, there were 115 executions and 22 commutations, for a ratio of 22/115 or 19.1%. *Ibid.*

penalty in the State found that while 64%[146] of condemned defendants escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38% for the 1949-1962 period, when a discretionary death penalty was in effect for all "capital" crimes.[147]

The apparent explanation for this phenomenon is that in a "mandatory" system, the clemency authority undertakes to compensate for mitigating factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the imposition of sentence. Clemency serves "as a vehicle for the expression of society's compassion, as an outlet from the rigorous inflexibility of [the] . . . judicial system."[148] One study has noted:

> "[i]n a jurisdiction which provides for the sentence of death unless the jury recommends

[146]BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3 (N.C. Dept. of Corrections 1973). This 64% figure is slightly different from the commutation rate cited in the *N.Y.U. Law Review* study, p. 95 *supra*, because the years surveyed (1903-1963 in the *N.Y.U. Review* study; 1910-1948 in the Behre study) were not identical. Another study of executive clemency in North Carolina reveals that of the 304 death sentences imposed between July 1, 1938, and December 31, 1953, 229 were commuted by the Governor, for a 77.1% clemency rate during this period. Johnson, *supra* note 145, at 166.

[147] BEHRE, *op. cit. supra* note 146, at Tables 2 and 3.

[148]Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 38 (1965).

> mercy, the judge being bound by the jury's recommendation to impose a sentence, the clemency authority would normally refrain from reweighing the mitigating evidence presented at the trial. Obviously, the jury has here had the opportunity to assess extenuating circumstances apart from the issue of guilt. It is the belief of many that this function of the jury strips the clemency authority of much of its power in capital cases."[149]

If this observation is correct, the "mandatory" death penalty created by *State v. Waddell* is calculated to result in more frequent grants of executive clemency as the Governor effectively takes over where the jury leaves off. Not surprisingly, the clemency process will simply mirror the jury sentencing process condemned in *Furman*, with Governors granting or denying commutation according to standards that are unexplained, unreviewable, and changeable whenever different incumbents take office.[150]

[149]Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 165-166 (1964) (footnote omitted).

[150]*See* the studies cited in note 145 *supra*. A system which places uncontrolled powers of commutation in the hands of a single official is arbitrary by definition. It can also be demonstrated that such a system is likely to be discriminatory in effect. A comparison of the executed and the commuted among condemned prisoners in Pennsylvania between 1914 and 1958 revealed that "less than 15 percent of the death-row offenders with court-appointed counsel received commutation of sentence compared to over 25 percent of those offenders with private counsel" (this differential was characterized as statistically significant for black, but not for white defendants) and that "there is reason to suspect – and statistically significant evidence

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> "For clemency knows no standards that are invocable as a matter of law. To the saved, this is mercy, of a quality not strained. To those who learn they are to die, it is irrational choice for death – the final such choice in a long series."[151]

The various forms of arbitrary selectivity remaining in North Carolina's "mandatory" death penalty procedure thus insure that there will be no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. We do not suggest by the foregoing analysis that the selective discretion present at any of the separate stages of the criminal process would be constitutionally

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to support the suspicion – that Negroes have not received equal consideration for commutation of the death penalty." Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301, 309, 311 (1962).

A study of executive clemency in Illinois concluded:

> "[c]ertain troublesome patterns seem to suggest themselves from an analysis of the referent Illinois commutation cases. It seems that much depends upon mere luck! What kind of attorney happens to be appointed by the state? How zealous is he in delaying execution through legal maneuvers and in generating publicity and public pressure? Of what logical relevance to life and death is a public relations campaign?"

Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 39 (1965).

[151]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 74 (1974).

objectionable in a non-capital case[152] or even that any one form of discretion would necessarily be enough to invalidate a death penalty under the Eighth Amendment. But the arbitrariness of the entire procedural system is cumulative; and the gauntlet which a capitally charged defendant must now run is fully as unpredictable – its results equally capricious – as under the pre-*Furman*, pre-*Waddell* system. At no point in the process is a visible and deliberative life-death choice required; yet the inevitable discretionary decisions can only be more freakish and wanton inasmuch as they are disguised and more diffused. This deadly lottery brings petitioner's death sentence to the heart of the historic concerns of the Eighth Amendment as recognized in *Furman*.

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[152]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 33 (1974):

> "[o]ur legal system is simply saturated, at all levels, with the ideas that requirements of fairness, certainty, and so on – all the things we mean when we say 'due process of law' – vary with the seriousness of the interest at stake, and that, as a corollary, imposition of the penalty of death carries with it a more exacting requirement than other punitive action of the political society."

Cf. Bell v. Burson, 402 U.S. 535, 540 (1971); *Stanley v. Illinois*, 405 U.S. 645, 650-651 (1972). *See also* pp. 115-117 *infra*.

III.

THE EXCESSIVE CRUELTY OF DEATH

There are additional reasons why the death penalty reinstated by *Waddell* violates the essential guarantees of the Eighth and Fourteenth Amendments. These reasons are interrelated in the prevailing *Furman* opinions, and we treat them together here. Essentially, *Furman* reviewed the history of this country's use of the punishment of death and concluded that, although the extreme penalty was then authorized by law in forty-one American States (and by the federal government and the District of Columbia), it was in fact so rarely and so arbitrarily inflicted under discretionary sentencing procedures that it constituted a cruel and unusual punishment. This was so because the occasional and virtually random extinction of human life was a cruelty compounded by inequity, and because the very randomness and rarity of the punishment belied any claim that it fulfilled an accepted or acceptable penal purpose.

In Part II of this brief, we have demonstrated that the use of the death penalty remains arbitrary, random and occasional under North Carolina's post-*Furman*, purportedly "mandatory" system of capital sentencing because that system provides numerous mechanisms which express and implement the unwillingness of prosecutors, judges, juries and the Governor to accept a general, uniform and even-handed application of the penalty. These mechanisms and their use continue to be the means by which a punishment incapable of general

or substantial application is reserved for visitation on a mute and disfavored few. That sort of application of a penalty is one of the hallmarks of a cruel and unusual punishment in the Eighth Amendment sense. In this Part III, we examine the several relevant hallmarks and submit that they collectively condemn the penalty of death. Such an examination should, however, begin with consideration of the proper standards of judicial review of a penalty challenged under the Eighth Amendment.

A. The Standard of Judicial Review

We start with the "elementary" truth[153] that legislative authorization of a punishment does not establish its conformity to Eighth Amendment principles of decency.[154] If this were otherwise, the Eighth Amendment would be "little more than good advice" from the Founding Fathers to future legislators. *Trop v. Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion of

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[153] *Weems v. United States*, 217 U.S. 349, 379 (1910).

[154] *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion of Chief Justice Warren):

> "[w]e are oath-bound to defend the Constitution. This obligation requires that [legislative] ... enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."

Chief Justice Warren.)[155] "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

This basic postulate is the source of the most delicate problem of Eighth Amendment adjudication: striking the balance between respect for the primary legislative power to define crimes and fix sanctions[156] and the diligence commanded by the constitutional role of the judiciary to protect and preserve the Constitution's

[155]George Mason, who drafted the 1776 Virginia Declaration of Rights, *see* note 56 *supra*, which contained a prohibition of cruel and unusual punishments that was almost identical to that of Clause 10 of the English Bill of Rights of 1689 and to the Eighth Amendment, declared in the Virginia ratifying convention that it was necessary to limit the arbitrary punishing power of all branches of government. *See* pp. 38-39 *supra*. Patrick Henry strongly agreed that Congress should not be allowed to "define punishments without this control." 3 ELLIOT'S DEBATES 447 (2d ed. 1863). *See* note 55 *supra*.

[156]In this litigation we deal, of course, with a decision to maintain capital punishment that was made by a bare majority of the North Carolina Supreme Court through the application of state-law severability doctrines to a state statute. Nevertheless, that decision speaks with the voice of North Carolina for federal constitutional purposes. *See Winters v. New York*, 333 U.S. 507, 512-515 (1948); *Cohen v. California*, 403 U.S. 15, 23-24 n.5 (1971).

guarantees of individual rights against governmental – that is, necessarily, majoritarian – overreaching.[157] The inescapable tension and its resolution were described with as much precision as the subject permits in *Weems v. United States*, 217 U.S. 349, 378-379 (1910):

> "... prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such cases, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, – that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by

[157]*Furman v. Georgia*, *supra*, 408 U.S. at 431 (dissenting opinion of Mr. Justice Powell) (citing *Blodgett v. Holden*, 275 U.S. 142, 147-148 (1927) (concurring opinion)):

> "[t]he review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized most appropriately by Mr. Justice Holmes as 'the gravest and most delicate duty that the Court is called on to perform.'"

> presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitations, we repeat, but constitutional ones, and what those are the judiciary must judge."

Thus, although a fitting deference to legislative will and to the autonomy of the States is always required, this Court bears the responsibility, placed exclusively upon it in the last analysis, to define and uphold the specific limitations which a written Constitution has erected as the boundaries beyond which no action or decision of American government may go.[158]

There are circumstances under which the danger is particularly great that legislative judgment will not duly heed the constitutional rights of individuals. Here judicial scrutiny of legislation ought to be commensurately exacting. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). This is most frequently the case where statutes fall harshly only upon "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938),

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[158] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958):

> "[i]n 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

See also United States v. Nixon, ____ U.S. ____, 94 S.Ct. 3090, 3106 (1974).

and where their operation takes a form that "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation," *id.* at 152 n.4. It is especially the case where cruel criminal punishments are applied to a very few: that is, in circumstances where the Eighth Amendment may be colorably invoked. And in the present case, additional considerations arising from the unique nature of the punishment of death require an uniquely stringent standard of judicial review under "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles, supra*, 356 U.S., at 101.

First, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100. The Amendment stands to assure that respect for individual human life and dignity restricts the state's responses to even the most culpable criminal conduct. Yet the decision to use capital punishment on a man implies a judgment that his dignity and worth may be denied absolutely, that his " 'life ceases to be sacred when it is thought useful to kill him.' "[159] Such a judgment deliberately to extinguish human life[160] –

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[159] Francart, quoted by Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 176 (Mod. Lib. 1963).

[160] "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have rights.' " *Furman v. Georgia, supra*, 408 U.S. at 290 (concurring opinion of Mr. Justice Brennan).

to employ a sanction that necessarily denies the very value upon which the Eighth Amendment rests – imperatively calls upon "the obligations [of] . . . the judiciary to judge the constitutionality of punishment" from an independent perspective. *Furman v. Georgia, supra,* 408 U.S. at 313-314 (concurring opinion of Mr. Justice White).

Second, the death penalty bears an awesome and irrevocable finality[161] incomparable with other punishments.[162] This Court has said of sterilization that "[t]here is no redemption for the individual whom the law touches." *Skinner v. Oklahoma ex rel. Williamson, supra,* 316 U.S. at 541. That is *literally* true of capital punishment. No eloquence can embellish, nor human mind entirely conceive, death's utter irreversibility.[163] New

[161]"Capital punishment is an evil, unless justified [because] . . . it extinguishes, after untellable suffering, the most mysterious and wonderful thing we know, human life." Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 291 (1971).

[162]Thus, the declaration of Lafayette that infliction of the death penalty should be suspended "until . . . the infallibility of human judgment is demonstrated." Quoted in Pollak, *The Errors of Justice*, 284 ANNALS 115 (1952), and CLARK, CRIME IN AMERICA 334 (1970). The quotation has also been attributed to Jefferson. *See* BLOCK, AND MAY GOD HAVE MERCY . . . 1 (1962). *See also* Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 CRIME & DELINQ. 121, 130-131 (1969).

[163]"Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed perhaps after many years in prison by the discovery of the real criminal."

(continued)

knowledge, second thought, calmer passions, lessons of experience – every known corrective for the inevitable errors of judgment in penological, political, and constitutional experimentation comes too late.[164]

Third, any balancing process which sets out to weigh the penalty of death in the pans of the Eighth Amendment must begin with the proposition that capital punishment is self-evidently cruel within every meaning of that word which a civilized, Twentieth-Century society can accept.[165] We do not deal here with a punishment that can be considered cruel only in relation to the conduct that it is used to regulate, *cf. Robinson v. California,* 370 U.S. 660, 667 (1962) –

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SELLIN, THE DEATH PENALTY, 63 (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959). *See also* Hogan, *Murder by Perjury*, 30 FORDHAM L. REV. 285 (1961); BORCHARD, CONVICTING THE INNOCENT 294-303, 309-316 (1932); Gardner, *Helping the Innocent*, 17 U.C.L.A. L. REV. 535 (1970).

[164]"[D]eath is different . . . it is irrevocable in quite a distinct sense from the general irrevocability of all happenings. If a mistake of any kind is discovered, it is too late. In every way and for every purpose, it is too late." BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 32 (1974).

[165]The evolutionary character of Eighth Amendment standards no longer needs argument. The Clause is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). *See also Furman v. Georgia, supra*, 408 U.S. at 242 (concurring opinion of Mr. Justice Douglas; *id.* at 264-269 (concurring opinion of Mr. Justice Brennan); *id.* at 325-328 (concurring opinion of Mr. Justice Marshall); *id.* at 383 (dissenting opinion of Chief Justice Burger); *id.* at 409 (dissenting opinion of Mr. Justice Blackmun); *id.* at 429 (dissenting opinion of Mr. Justice Powell.)

cruel in "consideration of the mischief and the remedy", *Weems v. United States, supra*, 217 U.S. at 373.[166]

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual in the constitutional sense because it was thought justified by the social ends it was deemed to serve."

Furman v. Georgia, supra, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

It is not an overstatement to describe confinement under sentence of death as exquisite psychological

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[166]Nevertheless, Camus' point deserves note:

> "[In considering the argument from *lex talionis*] let us leave aside the fact that the law of retaliation is inapplicable and that it would seem just as excessive to punish the incendiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft. Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."
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> Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 151-152 (Mod. Lib. 1963).

torture. *See People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 894 (1972). With the commendable motive – and under the inescapable obligation – of striving to avoid erroneous or illegal executions, Twentieth-Century American justice has prolonged that torture. Of 608 persons under sentence of death at the end of 1970, 302 had been on Death Row for more than three years, 165 for more than five years, 81 for more than seven years, and 67 for more than eight years.[167] "[C]ontemporary human knowledge"[168] of the nature of suffering and its effects upon the human mind teaches that over such extended periods the familiar manifestations of immediate terror cease as the extraordinary anxiety and pain of condemnation find other outlets. Anguish can no longer be conceived as some enormous multiple of the pain of a broken bone or a crushed fingernail, because human beings cannot tolerate many such multiplications without severe personality distortions such as the denial of reality.[169] The effects of these coping mechanisms observed in Death Row prisoners are acute;[170] the alternative is emotional

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[167]UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 42 (August, 1971).

[168]*Robinson v. California*, 370 U.S. 660, 666 (1972).

[169]*See*, Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 827 (1972).

[170]*See* Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962).

breakdown.[171]

The torture is perhaps more nearly comprehensible in the words of those who have suffered it:

> "My feeling toward being on death row is unlimited. I can go on and on telling you the different feelings I experience being on Death Row. But I'm going to make it brief, because I can take the 68,634,000 square miles of the Pacific Ocean and put it into ink, and take all the trees in America and put them into pencils and paper, and still, it won't be enough material to express my feeling towards being on death row. My feeling being on death row is like no tomorrow. When I go into deep meditation, I can see life and feel the freedom that the universe has to offer, but when I come out of it, it's like being in the middle of a nightmare. So you can see why my thoughts has no end.

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[171]An evaluation of eight North Carolina death row inmates revealed that three, or thirty-five percent, had made "relatively poor adjustments, with obvious deterioration." Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 81, 82, 1972. One of these had developed a complex delusional system; another became increasingly self-destructive and a third was constantly under medication "with varying degrees of unsustained relief" and was once hospitalized for drug overdose. *Id.* at 82-83. *See also* West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125, 127 (G.P.O. 1970); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (dissenting opinion of Justice Frankfurter).

> I feel as tho the world is caving in on me."[172]

The physical and psychological pain of execution itself – whether life is destroyed by gas, by electrocution, or by other means – is, of course, unmeasurable.[173] It is

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[172]Coley, *A Letter from Death Row*, 3 JURIS DOCTOR 19 (Dec. 1973). *Cf.* DOSTOEVSKY, THE IDIOT 20 (Mod. Lib. 1935). *See generally* LEVINE (ed.), DEATH ROW–AN AFFIRMATION OF LIFE (1972); CHESSMAN, TRIAL BY ORDEAL 3 (1955):

> "I've witnessed the disintegration of the minds of the men around me. I've seen these men naked on the floor, rolling in their own excrement. I've listened as they smashed and shattered the sinks and toilets and fixtures in their cells. I've heard their prayers and their screams and their curses. I've observed their bodies being removed after they had destroyed themselves. I've read their pathetic pleas for mercy."

[173]All medical witnesses agree that it takes a few seconds for the condemned man to lose consciousness after inhaling lethal gas. *See* Hamer, *The Execution of Robert H. White by Hydrocyanic Acid Gas*, 95 J. AM. MED. ASSN. 661 (1930); Rosenbloom, *Report of a Case of Chronic Hydrocyanic Acid Poisoning*, 8 J. LAB. & CLIN. MED. 258 (1923); ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 251-256 (H.M.S.O. 1953) [Cmd. 8932]. Other scientists assert that the condemned man is conscious for a longer time and dies by slow agonizing strangulation. KEVORKIAN, MEDICAL RESEARCH AND THE DEATH PENALTY 18-19 (1960). *See also* Schmitt & Schmitt, *The Nature of the Nerve Impulse: The Effect of Cyanides Upon Medullated Nerves* (Pt. 2), 97 AM. J. PHYSIOLOGY 302, 302-304 (1931). *Cf.* DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 102-103 (1962):

> "[t]he warden gives the executioner the signal and, out of sight of the witnesses, the executioner presses the lever that allows the cyanide gas eggs to mix with the distilled water

(continued)

one of the questions to which capital punishment cuts off an answer, leaving only such scant comfort or nagging doubt as speculation may provide. "Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death." *Furman v. Georgia, supra,* 408 U.S. at 287 (concurring opinion of Mr. Justice Brennan). Here again, the ordinary deference due to legislative judgment encounters the objection that legislators, in common with all other men, simply *cannot* know significant facts on which advised, dispassionate judgment ought to turn at least in part. The decision to kill a human being is intractably a decision to do an act whose most immediate major consequences are unknowable. No amount of legislative inquiries or knowledge can close up that gap (*compare, e.g., McGinnis v. Royster,* 410 U.S. 263 (1973)), and all a legislature's "groping efforts" at experimenting with the penalty of death (*compare, e.g., Tigner v. Texas,* 310 U.S. 141, 148 (1940)) will not provide its members or mankind more information on the subject.

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> and sulphuric acid. In a matter of seconds the prisoner is unconscious. At first there is extreme evidence of horror, pain, strangling. The eyes pop, they turn purple, they drool. It is a horrible sight. Witnesses faint. It finally is as though he has gone to sleep. The body, however, is not disfigured or mutilated in any way."

Evidence regarding the experience of electrocution is similarly inconclusive. A French scientist, Dr. L. G. V. Rota, has said "I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be." Quoted in SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 219 (1950).

Fourth, the compatibility of the death penalty with Eighth Amendment values is called into question by its *de jure* or *de facto* abandonment among civilized nations.[174] Capital punishment has been abolished by most of the countries of Western Europe and the Western Hemisphere,[175] and is now in virtual disuse throughout the world.[176] A penalty thus progressively repudiated on a world-wide scale surely warrants close and critical examination when tested by the constitutional standards of decency of a Nation whose citizens would be widely appalled to believe it laggard in the enlightened administration of justice.[177]

Fifth, long-standing traditions defining the judicial role in capital cases recognize the need for close

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[174]Despite a wave of terrorist bombings in 1974, the British House of Commons decisively rejected a measure to reinstitute the death penalty in Great Britian for terrorist murders. N.Y. Times, Dec. 12, 1974, at 7, col. 1.

[175]An analysis of world-wide trends in the authorization and use of the penalty of death is contained in Appendix D, pp. 1d - 6d *infra.*

[176]"Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority." UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) 3 (February 23, 1971).

[177]In declaring denationalization a cruel and unusual punishment, the Court relied in part upon the fact that "[t]he civilized nations of the world [were] . . . in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Trop. v. Dulles, supra,* 356 U.S. at 102.

scrutiny of the punishment of death. The principle of strict construction *in favorem vitae* runs deep in Anglo-American history,[178] and is only one exemplification of the special safeguards that apply in legal proceedings when life is at stake:

> "[a]ll the state legal systems in one way or another – by requiring jury unanimity, by forbidding pleas of guilty to a capital offense, by providing for automatic appeals, and so on – have recognized this distinction, quite without compulsion from the national Supreme Court. But when such compulsion was needed it has been forthcoming. For many years our federal Supreme Court required of the states that they invariably assign counsel in capital cases, while leaving the question of counsel in noncapital cases open to variation based on special circumstances; the fact that at last the Court decided counsel should be required in all serious criminal cases does not impair the force of the earlier cases as establishing national recognition of the immense difference between imprisonment and death. On the other side of the coin, the Supreme Court has several times upheld, as not violating any federal guarantee, state laws imposing more stringent requirements for trial in capital cases than in other cases."[179]

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[178]*See* 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 83-106 (1948).

[179]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 34 (1974). Profesessor Black refers, of course, to the evolution from *Powell v. Alabama*, 278 U.S. 45 (1932), through *Betts v. Brady*, 316 U.S. 455 (1942), to *Gideon v. Wainwright*, 372 U.S. 335 (1963); and to such cases as *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Review of procedural issues in death cases has been pursued under a policy of resolving legal "doubts . . . in favor of the accused,"[180] and capital convictions generally have been scrutinized on appeal with an avowedly strict eye for error.[181] At a time when the other considerations we have enumerated raise the question of the continuing constitutional validity of the death penalty itself, it is appropriate that the same strict scrutiny be turned upon that question.

Finally, in suggesting that sort of scrutiny, we ask no more of the Court than society itself demands. Other punishments – even punishments of extreme severity – are and have long been accepted without the extraordinary controversy, the collective soul-searching, and the parade of elaborate justifications and rationalizations that have accompanied the peculiar institution of capital punishment. Despite the relatively minuscule number of its victims[182] the justifiability of the death penalty has been the subject of continuing and heated

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[180]*Andres v. United States*, 333 U.S. 740, 752 (1948). *See also. e.g., Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (concurring opinion of Justice Frankfurter); *id*. at 77 (concurring opinion of Justice Harlan).

[181]Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 659 (1974), and authorities cited.

[182]In 1970 nearly 80,000 persons were admitted to state and federal adult correctional facilities, only 127 of whom were under sentence of death. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 358, 465 (August 1973).

debate[183] in religious, academic, legislative and law enforcement circles and among the general public. It is surely the case that "[a]t the very least . . . contemporary society views this punishment with substantial doubt." *Furman v. Georgia, supra,* 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

The moral character of this debate is as significant as its prevalence. The opposition to capital punishment – frequently voiced by religious denominations,[184] among others – has been vigorously asserted on the basis of "fundamental moral and societal values in our civiliza-

[183]The arguments for and against capital punishment have been frequently catalogued. *See. e.g.,* Vialet, *Capital Punishment: Pro and Con Arguments* (United States, Library of Congress, Legislative Reference Service, mimeo, August 3, 1966), reprinted *in Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 172-200 (G.P.O. 1970); BEDAU, THE DEATH PENALTY IN AMERICA 120-123 (rev. ed. 1967); 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1350-1363 (G.P.O. 1970). *See* notes 184-186 *infra.*

[184]For a description of the positions taken by various religious groups in opposition to capital punishment, see Bedau, *The Issue of Capital Punishment*, 53 CURRENT HISTORY No. 312 82, 84-85 August 1967).

tion and in our society."[185] Proponents of the death penalty have responded with equal moral fervor.[186] Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument.

[185]Canadian Prime Minister Lester B. Pearson, addressing the House of Commons in support of a bill restricting the death penalty for murder in Canada. CANADA, HOUSE OF COMMONS, IV DEBATES, 27th Parl., 2d Sess. (16 Eliz. II) 4370 (Nov. 16, 1967). For similar expressions, *see, e.g.*, Kazis, *Jewish Tradition and Capital Punishment*, 6 TRENDS 6 (Nov.-Dec. 1973); Editorial, *Genesis and Capital Punishment.* 66 CHRISTIAN CENTURY 355 (March 28, 1973); *Controversy Over Capital Punishment: Pro & Con*, 52 CONG. DIGEST 1, 10, 12, 16, 20, 26 (1974); National Council on Crime and Delinquency *Policy Statement on Capital Punishment*, 10 CRIME & DELINQ. 105 (1964); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROB. No. 2 11 (1964); Milligan, *A Protestant's View of the Death Penalty*, in BEDAU, THE DEATH PENALTY IN AMERICA 175 (rev. ed. 1967); Ehrmann, *For Whom the Chair Waits*, 26 FED. PROB. No. 1 14 (1962); BOK, STAR WORMWOOD (1959); CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (1927); GOWERS, A LIFE FOR A LIFE (1956); KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957)

[186]*See, e.g.,* Vellenga, *Christianity and the Death Penalty*, 6 CHRISTIANITY TODAY 7 (Oct. 12, 1959); Hon. Samuel Leibowitz, in *Symposium on Capital Punishment,* 7 N.Y.L.F. 249, 289-296 (1961); *Controversy Over Capital Punishment: Pro & Con*, 52 CONG. DIGEST 1, 11, 13, 15, 21, 25 (1974); Kinney, *In Defense of Capital Punishment*, 54 KY. L. J. 742 (1966); McDermott, *Some Crimes Demand the Death Penalty*, 11 POLICE 4 (Mar.-April, 1967); Caldwell, *Why Is the Death Penalty Retained?* 284 ANNALS 45 (1952); Coakley, *Capital Punishment*, 1 AM. CRIM. L. Q. 27 (1963); Cohen, *The Need for Capital Punishment,* 20 CHITTY'S L.J. 86 (1972); Hook, *The Death Sentence*, in BEDAU, THE DEATH PENALTY IN AMERICA 146 (rev. ed. 1967); Barzun, *In Favor of Capital Punishment,* 31 AM. SCHOLAR 181 (1962).

Agonizings of this sort that can neither be resolved nor stilled suggest a widespread perception that there is something fundamentally questionable about the penalty of death. In view of the extreme infrequency of its use, the troubled concerns which the punishment invariably arouses can only be explained by its uniquely and profoundly problematic aspects: its dissonance with the basic values of our society. For reasons to which we shall return – reasons having to do primarily with the rarity and secrecy of the actual use of the death penalty and with the outcast character of those subjected to it[187] – the problematic aspects of capital punishment have not stayed state and federal legislatures from enacting it. But those aspects particularly warrant independent and stringent examination of the death penalty by this Court at a moment when the Nation, which has not executed a man or woman for seven and a half years, agonizes once again upon the brink.

Such an examination requires that the Court determine whether the manifest cruelty of taking human life is or is not "justified by the social ends it [is] . . . deemed to serve."[188] Because of the unique character of the death penalty,[189] those justifications must be real and substantial;[190] and they must conform

[187] *See* pp. 134 - 139, *infra.*

[188] *Furman v. Georgia, supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[189] *See* pp. 107 - 120 *supra.*

[190] *Cf. N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-308 (1964) (involving the right of association). *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

to the fashion in which the penalty is applied in fact.[191] If "less drastic means for achieving the same basic purpose"[192] are available, the State must use them rather than indulge in the "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."[193] This much is implied in "the duty of [the] . . . Court to determine whether the action [of killing people] bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification,"[194] or whether, conversely, the punishment of death is excessive[195] and therefore unconstitutional.

B. THE JUSTIFIABILITY OF THE PENALTY OF DEATH

Criminal punishments are traditionally justified by five related but separable objectives: reformation and

[191] *Cf. Edwards v. South Carolina*, 372 U.S. 229, 236-237 (1963) (involving the right of free speech). *See also e.g., Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Carrington v. Rash*, 380 U.S. 89, 94-96 (1965).

[192] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (involving the right of association).

[193] *Furman v. Georgia, supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[194] *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) (involving the right of association).

[195] *Furman v. Georgia, supra*, 408 U.S. at 279-280, 300-305 (concurring opinion of Mr. Justice Brennan); *id.* at 309 (concurring opinion of Mr. Justice Stewart); *id.* at 312-313 (concurring opinion of Mr. Justice White); *id.* at 331-332, 342-359 (concurring opinion of Mr. Justice Marshall).

rehabilitation, moral reinforcement or reprobation, isolation or specific deterrence, retribution, and deterrence. It is not enough, however, that the death penalty simply implement one or more of these goals. It must be demonstrated that this uniquely harsh punishment is better fitted to the effectuation of the permissible purposes of the criminal law than other kinds of available criminal penalties.

Of the first two of these objectives, little need be said. Clearly "reformation . . . can have no application where the death penalty is exacted."[196] The imposition and execution of a death sentence are not designed to serve as instruments for the redemption of criminal offenders: to the contrary, they represent a determination that the offender is unredeemable.[197] Similarly, the moral reinforcement or reprobation function provides no substantial justification for the unique harshness of the death penalty.[198] While this

[196]ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 18 (H.M.S.O. 1953) [Cmd. 8932]. *See also* SELLIN, THE DEATH PENALTY 69-79 (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959); KOESTLER, REFLECTIONS ON HANGING 144-152 (Amer. ed. 1957); BEDAU, THE DEATH PENALTY IN AMERICA 395-405 (rev. ed. 1967); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 47 (1964).

[197]*Cf.* Stephen, *Capital Punishment*, 69 FRASER'S MAGAZINE 753, 763 (1864): "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world. Take your chance elsewhere.' "

[198]*See* Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT 3, 16-17, 19 (1967).

objective doubtless requires that the most serious crimes be punished most seriously, "[g]rading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty."[199] This objective contains no commensurability standard whereby the relative efficacy of the death penalty and life imprisonment can be judged. A severe punishment of any kind enforces equally the restraints of the criminal law.

While the death penalty may have once been necessary to control dangerous criminals, the development of a penitentiary system in the Nineteenth Century has provided an alternative means of containing such persons.[200] Moreover, there is evidence that

[199]BEDAU, THE DEATH PENALTY IN AMERICA 268 (rev. ed. 1967).

[200]*See* Bedau, *The Courts, The Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 232:

> "[i]n 1790, when the eighth amendment was adopted (and even more so in earlier centuries, when 'cruel and unusual punishments' were first prohibited in England) only two types of punishment were available to cope with serious offenses: death (with or without aggravations) and banishment, or 'transportation,' to the colonies or some other remote and relatively uninhabited region. Imprisonment, as something more than a mode of temporary detention prior to trial or as punishment for a minor offense, was entirely unknown at the time anywhere in Europe or America. How could anyone in 1790 sensibly have demanded that the 'evolving standards of decency' required there and then imprisonment rather than death for felons? There were no prisons, no trained custodial and administrative officers, no parole system, no statutes to authorize creating any of these, no public disposition to obtain them – in short, none of the attitudes, facilities and

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convicted murderers are less likely to engage in future criminal behavior than are other classes of offenders.[201] The execution of criminal defendants to insure their

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> personnel obviously necessary to run a system of long term incarceration. Today, of course, banishment is no alternative at all. Instead, imprisonment is an entirely commonplace practice and a viable alternative to banishment and death for every serious crime. However inhumane and brutal imprisonment may be (and there is no doubt that in practice it often is), involuntary incarceration under close supervision may still be a *necessary* 'cruelty' in most cases involving the commission of violent crimes. The undeniably greater severity of death as a punishment over imprisonment is, *ceteris paribus*, sufficient by itself to establish its greater cruelty."

There are now in this country, 4,401 state, federal and local correctional facilities employing more than 70,000 people. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 108-109 (August 1973).

[201] A study of parole violation found that "[t]he percentage of Willful Homicide violators returned to prison on new commitments . . . [was], with one exception (Alcohol Laws Violations), the lowest in any offender group." Neithercutt, *Parole Violation Patterns and Commitment Offense*, 9 J. RESEARCH CRIME & DELINQ. 87, 90 (1972). The murderer has also been found to have "a lower 'criminality level' than the non-murderer [while] in the prison population." Waldo, *The "Criminality Level" of Incarcerated Murderers and Non-Murderers* 60 J. CRIM L., CRIM. & POL. SCI. 60, 70 (1970). Of twenty-six homicides committed in American prisons in 1964, only two were committed by inmates serving sentences for capital murder. Sellin, *Homicides and Assaults in American Prisons, 1964*, 31 ACTA CRIMINOLOGIAE ET MEDICINAE LEGALIS JAPONICA 139 (1965).

effective isolation from society is an excessive punishment since less drastic means now exist to protect society (and are customarily used, for example, to constrain homicide defendants whose mental condition renders them incompetent to stand trial). Although the death penalty effectuates the goal of isolation of offenders, it is an unnecessarily harsh mechanism for obtaining this result.

The fourth traditional goal of criminal punishments is retribution, the achievement of the ancient *talionis* principle.

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law."

Furman v. Georgia, supra, 408 U.S. at 308 (concurring opinion of Mr. Justice Stewart). The question of how far retribution, standing alone, is a legitimate goal of the criminal law in the mid-1970's is a complex one; but this case does not present that question for decision, since the death penalty as it is administered under the *Waddell* decree is not retributive in any meaningful way:

> "the issue . . . is not . . . whether it is fair or just that one who takes another person's life should lose his own. Whatever you think about that proposition it is clear that we do not and cannot act upon it generally in the administration of the penal law. The problem rather is whether a small

> and highly random sample of people who commit murder or other comparably serious offenses ought to be despatched, while most of those convicted of such crimes are dealt with by imprisonment."[202]

The concept of retribution requires both a factual equivalency and a procedural regularity in the imposition of punishment[203] which are simply not present in the administration of the death penalty for first degree murder, as we have demonstrated in Part II *supra*. While the *Waddell* death penalty might be sought to be justified indirectly in light of a retributive goal as a device to forestall private acts of vengeance, there is no empirical evidence that lynch law increases as executions decline. In fact, the relation between the lynching rate and the execution rate appears to be more one of direct than inverse proportionality, as the following statistics demonstrate:

Known Executions[204]

Decade	Legal	Illegal
1890's	1,214	1,540
1900's	1,176	885
1910's	1,031	621
1920's	1,162	315
1930's	1,667	130
1940's	1,284	5
1950's	717	2[205]

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[202]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 255 (1961).

[203]*See also* Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, CAPITAL PUNISHMENT 239, 243 (1967):

> "if we conservatively assume that there are now about 2500 capital murders annually in the United States and but seven executions, it is obvious that a life for a life is rarely taken."

[204]BOWERS, EXECUTIONS IN AMERICA 40 (1974).

[205]Available data on illegal executions ended in 1956 *Ibid.*

There is yet another sense in which the death penalty can be said to bear no meaningful relation to the goal of retribution, for the *lex talionis* affords no commensurability standard. The attempts of various post-*Furman* statutes to authorize the death penalty for "outrageously or wantonly vile, horrible or inhuman" killings[206] attest to this difficulty. For surely there is no retributive logic to justify the simple asphyxiation or electrocution of a defendant who has committed an atrocious crime: such a crime demands a far harsher punishment (under this logic) than the "mere extinguishment of life," *Ex parte Kemmler*, 136 U.S. 436, 447 (1890) But such punishments are clearly forbidden by the Eighth Amendment. With these constitutional limitations, it cannot be asserted that any particular penalty is more supportable by a retributive purpose than any other penalty.

The most frequently voiced justification for the death penalty is the deterrence of capital crimes However, as the empirical findings collected in Appendix E to this brief, pp. 1e-10e *infra*, conclusively demonstrate, there is no credible evidence – despite the most exhaustive inquiry into the subject – that the death

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[206]Ga. Code § 27-2534.1 (1) (7) (1973). *See* Appendix A, p. 22a *infra*.

penalty is a deterrent superior to lesser punishments.[207] The conclusions set forth in Appendix E may be briefly summarized. Official and scholarly inquiries have concluded overwhelmingly that use or disuse of the death penalty has no effect upon the frequency of criminal homicide. This conclusion is based on the following statistical evidence.

> Death penalty jurisdictions do not have a lower rate of criminal homicide than abolition jurisdictions.
>
> Given two states otherwise similar in factors that might affect homicide rates, and differing in that one employs capital punishment while the other does not, the abolition state does not show any consistently higher rate of criminal homicide.

[207]The few published claims of deterrent efficacy are based upon impressionistic accounts of law enforcement officers and do not explain the failure of the death penalty to affect crime rates. *See, e.g.*, Hoover, *Statements in Favor of the Death Penalty*, in BEDAU, THE DEATH PENALTY IN AMERICA 130 (rev. ed. 1967); Allen, *Capital Punishment: Your Protection and Mine*, in BEDAU, THE DEATH PENALTY IN AMERICA 135 (rev. ed. 1967). We know of only one research-based claim of the deterrent efficacy of the death penalty. It is based upon unpublished findings but has been alluded to in a recent article as "indicat[ing] that each execution prevents between 8 and 20 murders." Tullock, *Does Punishment Deter Crime?*, THE PUBLIC INTEREST No. 36 103, 108 (1974), referring to Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, "to be published" in THE AMERICAN ECONOMIC REVIEW, *id.*, at 111. Tullock goes on to say that: ". . . unfortunately, the data available for this study were not what one would hope for, so not as much reliance can be put upon [the] . . . results as one normally would give to work by such a sophisticated econometrician." *Id.* at 108.

> In jurisdictions which abolish the death penalty, abolition has no influence on the rate of criminal homicide.
>
> Jurisdictions which reintroduce the death penalty after having abolished it do not show a decreased rate of criminal homicide after reintroduction.
>
> Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.

The same conclusion has been reached with regard to the "mandatory" death penalty; "no indication" has been found "that the mandatory death penalty [is] . . . a more effective deterrent of homicide than discretionary capital punishment."[208]

These findings are not surprising. For, in the first place, "crimes are committed for reasons other than a rational weighing of consequences."[209] And, in the second place, the very aberrational, violent behavior to which the death penalty is now exclusively applied is less deterrable than any other human behavior, whether the sanction is death or imprisonment:

> "[t]he deterrence argument requires that man be an essentially rational being, weighing all the possible consequences of his acts and rating the desirability of each possible consequence. Whether or not this view of man is generally true is

[208]BOWERS, EXECUTIONS IN AMERICA 160 (1974).

[209]Brief *Amicus Curiae* of the Committee of Psychiatrists for Evaluation of the Death Penalty, in *Aikens v. California*, 406 U.S. 813 [No. 68-5027] pp. 6-7.

debatable, but in the instance of murderers it is most certainly untrue."[210]

C. Public Acceptance of the Penalty of Death

Against the background of this evidence that the death penalty is excessive and unserviceable in terms of

[210]KAKOULLIS, THE MYTHS OF CAPITAL PUNISHMENT 2 (*CENTER FOR RESPONSIBLE PSYCHOLOGY, BROOKLYN COLLEGE*, C.U.N.Y., Report No. 13, 1974). *See also* Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WISC. L. REV. 703; FATTAH, A STUDY OF THE DETERRENT EFFECT OF CAPITAL PUNISHMENT WITH SPECIAL REFERENCE TO THE CANADIAN SITUATION 31-38 (Department of the Solicitor General, Canada, Research Centre Report No. 2, 1972). Indeed, there is strong evidence that the death penalty may service to *incite* murder. It has been reported that in the seventeenth and eighteenth centuries there was an "epidemic of indirect suicides [in Norway and Denmark] . . . when depressed people committed murder in order to be put to death . . . ." *Id.* at 39. In both countries laws were passed specifically exempting such people from the death penalty. "The law passed in Denmark in 1767 abandoned the death penalty in cases where 'melancholy and other dimal persons (committed murder) for the exclusive purpose of losing their lives.'" *Ibid.* Moreover, there is evidence that even the limited publicity surrounding an execution "has a 'brutalizing' effect on the population that more than offset[s] any deterrent effects" by causing an increase in the incidence of homicide in the periods immediately surrounding executions. BOWERS, EXECUTIONS IN AMERICA 20 (1974). *See also* Glaser & Zeigler, *Use of the Death Penalty v. Outrage at Murder*, 20 CRIME & DELINQ. 333 (1974).

the legitimate goals of the criminal justice system, we ask the Court to look again at the use society has made of it. For although the facts warrant a judicial judgment of excessiveness, the Court need not rely solely on its own appraisal of them. Society itself has pronounced a judgment, by its actions if not by its words. That judgment is that the penalty of death is both excessive and unacceptable.

To be sure, thirty jurisdictions have enacted death-penalty legislation since *Furman* (narrower, in all but two cases, than their pre-*Furman* authorizations of capital punishment).[211] But, in every case, the legislature has preserved or created a wide range of selective mechanisms by which the death penalty can be avoided in most cases. Some States have expressly conferred life-or-death sentencing discretion upon capital juries, to be exercised pursuant to standards that purport to confine such discretion but do not do so in fact.[212] Other States allow escape from "mandatory" death penalties through a variety of preconviction and postconviction outlets like those of North Carolina which we have described in Part II at pp. 45-100 *supra*. In this setting at least, the number of legislative authorizations is not – as *Furman* properly held – an appropriate test of acceptability of a harsh punishment. For acceptability is measured by what an enlightened public conscience will allow the law actually to do, not what it will permit a statute to threaten vaguely.[213] And

[211]See note 15, *supra*; Appendix A, pp. 42a-43a, 55a *infra*.

[212]*See* Petition for Writ of Certiorari, *Eberheart v. Georgia*, No. 74-5174 (filed August 19, 1974) pp. 32-36.

[213]"The objective indicator of society's view of an unusually severe punishment is what society does with it . . . ." *Furman v. Georgia, supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

the authors of even purportedly "mandatory" legislation – legislation written to be administered through discretionary judgments of prosecutors, judges, juries, and the Governor – can hardly be unaware that they are not in fact ordaining death except in a fraction of the cases covered by the statute.[214] Prosecutors may be relied upon to "avoid the unacceptably rigorous application of the letter of the law"[215] by filing and accepting pleas to non-capital charges[216] with the

[214]*Cf.* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1252 (1974):

> "[a]s reported previously, a substantial 59 percent of the public now favors capital punishment in principle. No more than 39 percent of the same persons, however, could say, 'If guilt were proven, I could always vote guilty even though the defendant would automatically receive the death penalty.' Another 16 percent agreed with the statement, 'I could never vote guilty, even if guilt were proven, knowing that the defendant would automatically receive the death penalty.' And a larger percent agreed that, 'I could not say in all cases, even if guilt were proven, that I would vote guilty, knowing the defendant would automatically receive the death penalty.'
>
> Thus, by 49-39 percent, the American people indicate that in actual practice they would individually oppose the automatic imposition of the death penalty if a person were proven guilty of a crime such as murder.
>
> The clear implication of these results is that while people feel that capital punishment is the most effective deterrent to crimes that take the life of other persons, there should be much latitude in the way the death sentence is handed out. The public wants to have the death penalty on the books, but would use it sparingly and by no means as an automatic punishment for a capital crime."

[215]*See* text at note 91 *supra.*

[216]*See* pp. 45-61 *supra.*

acquiescence (where required) of trial judges.[217] Juries can be counted on to make sentencing decisions "under the guise of resolving issues of evidential doubt."[218] At the end of the judicial process, the Governor may be expected to provide "an outlet from the rigorous inflexibility"[219] of "mandatory" capital punishment.

We are left, then, with the history of the past as prelude to the future. What that history shows is a rejection of the death penalty that "could hardly be more complete without becoming absolute."[220] Given a choice of punishing "capital" offenders by death or something less, American systems of criminal justice have chosen against death for all but a scant handful of offenders.

> "Although the number cannot be determined with precision, no one can doubt that in each of the

[217]*See* pp. 57,61 *supra.*

[218]KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966). We have seen, indeed, that jury acquittals motivated by a desire to avoid capital punishment under "mandatory" sentencing schemes provided a major impetus for the replacement of those schemes with overtly "discretionary" ones during the late Nineteenth and early Twentieth Centuries. *See* note 133 *supra. Cf.* Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32, 35 (1974):

> "[a]ntebellum Americans ... whose experience with mandatory capital punishment was extensive, tended to account it a dangerous failure. They were satisfied that mandatory capital punishment did indeed have a deterrent effect; it deterred jurors from convicting palpably guilty men."

[219]*See* text at note 148 *supra.*

[220]*Furman v. Georgia, supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

years involved [1930-1959], with executions ranging from 199 to 48, there were literally thousands of prosecutions that could legally have ended in a capital judgment.

. . . . . .

The conclusion . . . is inescapable that punishment of death is inflicted in the United States on a bare sample of the culprits whose conduct makes them eligible for its imposition . . . .

[T]his experience reveals a deep reluctance in our culture to employ the final sanction. . . ."[221]

This reluctance "to impose or authorize the carrying out of a death sentence"[222] is the more eloquent because of the context in which it has occurred. For it is fair to say that the conditions of administration of capital punishment during the past several decades have been such as to promote its public acceptability to the fullest extent consistent with its nature and the tenor of the public conscience. In the first place, every American execution since 1936 has taken place in secret, isolated by law from the public eye and

[221]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. F. 249, 252-253 (1961).

[222]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967).

conscience.[223] Indeed, there are but a handful of people in this Nation who have witnessed an execution and can speak with authority to the proposition that:

"... if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of humanity and of human dignity and decency."[224]

The rarity and secrecy of executions account for the fact that, although it is everywhere agreed that the cruelty of a death sentence is such that its imposition requires extraordinary justification, the wealth of research and theoretical debate on the subject of capital punishment is largely ignored. The often noted fact that "... American citizens know almost nothing about capital punishment"[225] reflects two circumstances: we

[223]The first American State to abolish public executions was Pennsylvania, in 1834. *See* Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124, 127 (1952). Public execution terminated in England in 1868, *see* TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN 20 (1961); and such executions were progressively outlawed in the United States throughout the Nineteenth Century, *see* BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 6 (1919). The last public execution in the country seems to have occurred in Kentucky in 1936. BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 307 (3rd ed. 1959).

[224]Gottlieb, *Capital Punishment*, 15 CRIME & DELINQ. 1, 6 (1969). *See* West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong. 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970).

[225]*Furman v. Georgia*, *supra*, 408 U.S. at 362 (concurring opinion of Mr. Justice Marshall) (citing Gold, *A Psychiatric Review of Capital Punishment*, 6 J. FORENSIC SCI. 465, 466 (1961); KOESTLER, REFLECTIONS ON HANGING 164 (Amer. ed. 1957); and DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 257-258 (1962)).

are protected by disuse and by official secrecy from its reality; and, as a consequence, there is no incentive to examine rigorously its justifiability.

But the death penalty also knows a different and less innocent kind of isolation from public consciousness and conscience. It is a fact of human nature that we respond more readily to wrongs committed against those with whom we identify – those most like ourselves in appearance, background and mores. Conversely, wrongs we would not tolerate when done to our own kith or kind are tolerable when inflicted on those we despise or can ignore. The strong extant evidence and observations that the death penalty has been disproportionately applied to racial minorities[226]

[226]Racial discrimination in the imposition of capital punishment has been borne out in a number of discrete and limited but careful studies. Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 18-21, 52-53 (1964). Moreover, it has seemed apparent to responsible commissions and individuals studying the administration of the death penalty in this country. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967); PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT 14-15 (1961); UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) 32, 98 (1968); BEDAU, THE DEATH PENALTY IN AMERICA 411-413 (rev. ed. 1967); CLARK, CRIME IN AMERICA 335 (1970); MATTICK, THE UNEXAMINED DEATH 5, 17 (1966); WOLFGANG & COHEN, CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS 77, 80-81 (1970); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952); Bedau, *A Social Philosopher Looks at the Death*

and to the poor[227] therefore cannot be ignored in

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Penalty, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); *and see* Rubin, *Disparity and Equality of Sentences – A Constitutional Challenge*, 40 F.R.D. 55, 66-68 (1967); BOWERS, EXECUTIONS IN AMERICA 71-120 (1974); Auerbach, *Common Myths About Capital Criminals and Their Victims*, 3 GEORGIA J. CORRECTIONS 41 (1974). Evidence of discrimination has been equally strong when the sentencing systems under study were ostensibly mandatory:

> "... although we have no empirical evidence that the mandatory death penalty is superior to discretionary sentencing as a deterrent to murder, we have seen that it has been associated with higher levels of execution, with comparable levels of racial discrimination, and, very likely, with reduced levels of capital convictions. In view of this evidence, it would appear that the adoption of the mandatory death penalty would mean a greater sacrifice of human life, continued discrimination against blacks, and the inability to convict some guilty offenders, without any deterrent benefit."

BOWERS, *op. cit. supra*, at 162; *see also* Garfinkel, *supra*.

The following are the total numbers of persons executed between 1930 and 1970, broken down by offense and race, as they appear in UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, *Capital Punishment 1930-1970* 12 (August, 1971):

	Murder	Rape	Other	Total
White	1664(49.9%)	48(10.5%)	39(55.7%)	1751(45.4%)
Negro	1630(48.9%)	405(89.1%)	31(44.3%)	2066(53.5%)
Other	40(1.2%)	2(0.4%)	0(0.0%)	42(1.1%)
	3334 (100%)	455(100%)	70(100%)	3859(100%)

[227]"It is the poor, the sick, the ignorant, the powerless and the hated who are executed." CLARK, CRIME IN AMERICA 335 (1970). See DUFFY & HIRSHBERG, 88 MEN AND 2

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assessing the quality of such acceptance as the penalty has had. For present purposes, it matters little whether these disproportions are the result of discrimination, passive lack of empathy, inadequacy of defense resources 228, or some more benign explanations. The very fact of the disproportion means that public response

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WOMEN 256-257 (1962); LAWES, TWENTY THOUSAND YEARS IN SING SING 302 (1932); LAWES, LIFE AND DEATH IN SING SING 155 (1928); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956); West, *Medicine and Capital Punishment,* in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary,* 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970); McGee, *Capital Punishment as Seen by a Correctional Administrator,* 28 FED. PROB. (No. 2) 11, 12 (1964).

The characteristics of the inmates of death row are described in Bedau, *Death Sentences in New Jersey 1907-1960,* 19 RUTGERS L. REV. 1 (1964); Bedau, *Capital Punishment in Oregon, 1903-1964,* 45 ORE. L. REV. 1 (1965); Carter & Smith, *The Death Penalty in California: A Statistical and Composite Portrait,* 15 CRIME & DELINQ. 62 (1969); Johnson, *Selective Factors in Capital Punishment,* 36 SOCIAL FORCES 165 (1957); Koeninger, *Capital Punishment in Texas, 1924-1968,* 15 CRIME & DELINQ. 132 (1969). *And see* Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae,* in *Boykin v. Alabama,* 395 U.S. 238 (1969) [O.T. 1968, No. 642], p. 7 n.8.

[228]For a review of the disadvantages under which defense of an indigent, low or moderate income person must be conducted, *see* Goldberg, *Equality and Governmental Action,* 39 N.Y.U.L. REV. 205, 218-224 (1964).

to the enormity of the decision to kill a fellow human being is blunted. To the average citizen and the citizen of influence, death remains a penalty for *them,* not for *us.* . At this point, description of the acceptance of capital punishment by contemporary society becomes appropriately cyclical. For infrequent, racially and socially disproportionate application of the death penalty is maintained by the very attitudes it has helped to create. A harsh penalty, unacceptable in general application, is inflicted on the powerless and the unpopular while more sympathetic and attractive classes of defendants are spared. Thus applied, the residue of the penalty is acceptable to the public, which feels no pressure to restrict its broad availability on the statute books. The broad availability of the penalty in turn creates consistent pressure upon prosecutors, jurors, judges, and Governors, to take advantage of a variety of selective mechanisms to avert the punishment from all but an impotent and anonymous few.

This pattern of use, in turn, makes the justifications of capital punishment even more hollow. Reluctant, unpredictable and spotty application of the death penalty deprives it of the least capacity to serve its supposed penal functions. As a deterrent, it is wholly incredible; as a disabler, it is as useless and fortuitous as it is unnecessary; as an instrument of retribution, it is inadequate, haphazard, and unjust. The few men whom it kills die for no reason; they are executed "in the name of a theory in which the executioners do not believe."[229] Distaste for the penalty grows, and fewer men are killed as society "watch[es] without impatience its gradual disappearance."[230]

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[229]Camus, *Reflections on the Guillotine,* in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 141 (Mod. Lib. 1963).

[230]Ancel, *The Problem of the Death Penalty,* in SELLIN, CAPITAL PUNISHMENT 3 (1967).

The cycle can be broken only if the Eighth Amendment is employed in its most vital and essential function: to assure that principles of human decency are universally enforced, even – and especially – where rare and random application of a punishment makes their occasional violation virtually invisible except to the condemned.

CONCLUSION

Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the North Carolina Supreme Court should therefore be reversed.

Respectfully submitted,

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APPENDIX A

CAPITAL PUNISHMENT STATUTES ENACTED SINCE FURMAN v. GEORGIA

ARIZONA

Arizona provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. Ariz. Rev. Stat. § 13-543(A). The choice between these alternative penalties is made by the trial judge after a separate, post-conviction sentencing hearing. Ariz. Rev. Stat. § 13-454(A). The judge must return a special verdict setting forth his findings as to the existence or non-existence of each of a number of specified aggravating and mitigating circumstances. Ariz. Rev. Stat. § 13-454(C). The burden of establishing aggravating circumstances rests on the State, while the burden of establishing mitigating circumstances rests on the defendant. Ariz. Rev. Stat. § 13-454(B). In neither case is the requisite quantum of proof stated.

In determining whether to impose a life or death sentence:

> "the court shall take into account the mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency."

Ariz. Rev. Stat. § 13-454(D).

The following "aggravating circumstances" are set forth in Ariz. Rev. Stat. § 13-454(E):

"1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner."

The following "mitigating circumstances" are set forth in Ariz. Rev. Stat. § 13-454(F):

"1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases, although plea negotiation is regulated in other ways by Ariz. Rev. Stat., Rule 17.4. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on August 8, 1973.

ARKANSAS

Arkansas provides the death penalty for some cases of "capital felonies." "Capital felonies" are defined by Ark. Code § 41-4702 as (1) treason, and (2) an "unlawful killing" either (a) during the commission or attempted commission of enumerated felonies, or (b) of policemen or other enumerated public officers in the line of duty, or of "any public official or any candidate for public office" when the killing is perpetrated "from a premeditated design to effect the death of the person killed or of any other human being," or (c) of two or more persons pursuant to a similar "premediated design," or (d) by a person already under sentence of death or life imprisonment.

The punishment for a "capital felony" is either death or life imprisonment. Ark. Code § 41-4706. The choice between these alternative penalties is made by a jury after a separate, post-conviction sentencing hearing.

Ark. Code §41-4710(b). The jury must return a special verdict setting forth its findings as to the existence or non-existence of each of a number of specified aggravating and mitigating circumstances. Ark. Code §41-4710(e).

The jury must also set forth in its verdict its conclusion:

> "(i) whether beyond a reasonable doubt sufficient aggravating circumstances . . . exist to justify a sentence of death; [and]
>
> (ii) whether sufficient mitigating circumstances . . . exist to justify a sentence of life imprisonment. . . ."

Ark. Code §4710(d); *see also* Ark. Code §4710(e). And the jury must "render a sentence based upon" these conclusions. Ark. Code §4710(d). When "the jury in its discretion finds mitigating circumstances . . . and determines that these mitigating circumstances preclude the imposition of death . . . , then such crime" is punished by life imprisonment. Ark. Code §41-4703.

The following "aggravating circumstances" are set forth in Ark. Code §41-4711:

> "(a) the capital felony was committed by a person under sentence of imprisonment;
>
> (b) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;
>
> (c) the defendant in the commission of the capital felony knowingly created a great risk of death to one (1) or more persons in addition to the victim;
>
> (d) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

> (e) the capital felony was committed for pecuniary gain; and
>
> (f) the capital felony was committed for the purpose of disrupting or hindering the lawful exercise of any governmental function, political function or the enforcement of laws."

The following "mitigating circumstances" are set forth in Ark. Code §41-4712:

> "(a) the capital felony was committed while the defendant was under extreme mental or emotional disturbance;
>
> (b) the capital felony was committed while the defendant was acting under unusual pressures or influences, or under the domination of another person;
>
> (c) the capital felony was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse;
>
> (d) the youth of the defendant at the time of the commission of the capital felony; or
>
> (e) the capital felony was committed by another person and the defendant was an accomplice or his participation relatively minor."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. Certain procedural and reporting requirements are imposed upon the Governor in the exercise of his clemency power, Ark. Code §41-4714, but his absolute

discretion to grant or deny commutation is left unaltered.

This statute became effective on July 24, 1973.

CALIFORNIA

California provides the death penalty for some cases of first degree murder (Cal. Penal Code § 190.1 (West Supp. 1974)), for some cases of kidnapping for ransom (Cal. Penal Code § 209 (West Supp. 1974)), for some cases of deadly assault by a life-term inmate (Cal. Penal Code § 4500 (West Supp. 1974)), and for some cases of trainwrecking (Cal. Penal Code § 219 (West Supp. 1974)).

The punishment for these crimes is either death or life imprisonment. Cal. Penal Code § § 190.1, 209, 219, 4500 (West Supp. 1974). In cases of first degree murder, the choice between these alternative penalties is made by a jury (or by the trial judge if a jury is waived by the defendant) after a separate, post-conviction sentencing hearing. Cal. Penal Code § 190.1. The jury must return a special verdict setting forth its finding as to the existence or non-existence of each of the "special circumstances" charged. "In case of a reasonable doubt whether a special circumstance is true, the defendant is entitled to a finding that it is not true." Cal. Penal Code § 190.1. However, the burden of proving or disproving "special circumstances" is not allocated, except that "[w]herever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of a crime." Cal. Penal Code § 190.1. In

cases of kidnapping for ransom and trainwrecking, the penalty is death where "any person subjected to any such act suffers death." Cal. Penal Code § § 209, 219. In cases of deadly assault by a life-term inmate, the penalty is death where the victim is a non-inmate who dies within a year and a day "as a proximate result" of the assault. Cal. Penal Code § 4500. The bifurcated trial procedures of Cal. Penal Code § 190.1 are apparently not applicable to the offenses of kidnapping for ransom, trainwrecking or deadly assault by a life-term inmate.

The following "special circumstances" are set forth in Cal. Penal Code § 190.1:

> "(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. . . .
>
> (b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:
>
> (1) The victim is a peace officer . . . who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.
>
> (2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.
>
> (3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery . . .

(ii) Kidnapping . . .

(iii) Rape by force or violence, . . . or by threat of great and immediate bodily harm . . .

(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14 . . .

(v) Burglary . . . of an inhabited dwelling housing entered by the defendant with an intent to commit grand or petit larceny or rape.

(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on January 1, 1974.

COLORADO

Colorado provides the death penalty for some cases of "class 1 felonies." Sec. 4, Col. S.B. No. 46 (1974 sess.) First degree murder, Col. Rev. Stat. 1963 § 40-3-102 (1971 Supp.) and first degree kidnapping, Col. Rev. Stat. 1963 § 40-3-301 are defined as "class 1 felonies."

The punishment for a "class 1 felony" is either death or life imprisonment, Sec. 4, Col. S.B. No. 46 (1974 sess.). The choice between these alternative penalties is made by the trial jury (or the trial court, if a jury was waived) after a separate, post-conviction sentencing hearing. *Ibid.* The jury must return a verdict making a "finding" as to the existence or nonexistence of "aggravating factors" (specified in § 4(5)) and "mitigating factors" (specified in § 4(6)). The burden of establishing "aggravating" or "mitigating" factors is not allocated, and in neither case is the requisite quantum of proof stated.

> "If the sentencing hearing results in a verdict or finding that none of the factors set forth in subsection (5) of this section exist and that one or more of the factors set forth in subsection (6) of this section do exist, the court shall sentence the defendant to death. If the sentencing hearing results in a verdict or finding that none of the aggravating factors set forth in subsection (6) of this section exist or that one or more of the mitigating factors set forth in subsection (5) of this section do exist, the court shall sentence the defendant to life imprisonment. If the sentencing hearing is before a jury and the verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment."

Sec. 4(4), Col. S.B. No. 46 (1974 sess.).

The following "mitigating factors" are set forth in subsection (5), which provides that "[t]he court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:

(a) He was under the age of eighteen; or

(b) His capacity to appreciate wrongfulness [sic] of his conduct or to conform his conduct to

the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

Sec. 4(5), Col. S.B. No. 46 (1974 sess.).

The following "aggravating factors" are set forth in subsection (6), which provides that "[i]f no factor set forth in subsection (5) of this section is present, the court shall sentence the defendant to death if the sentencing hearing results in a verdict or finding that:

(a) The defendant has previously been convicted by a court of this or any other state, or of the United States, of an offense for which a sentence of life imprisonment or death was imposed under the laws of this state or could have been imposed under the laws of this state if such offense had occurred within this state; or

(b) He killed his intended victim or another, at any place within or without the confines of a penal or correctional institution, and such killing occurred subsequent to his conviction of a class 1, 2, or 3 felony and while serving a sentence imposed upon him pursuant thereto; or

(c) He intentionally killed a person he knew to be a peace officer, fireman, or correctional official.

The term "peace officer" as used in this section means only a regularly appointed police officer of a city, marshal of a town, sheriff, undersheriff, or deputy sheriff of a county, state patrol officer, or agent of the Colorado bureau of investigation; or

(d) He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him; or

(e) He has been a party to an agreement in furtherance of which a person has been intentionally killed; or

(f) He committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used herein, explosive or incendiary device means:

(i) Dynamite and all other forms of high explosives;

(ii) Any explosive bomb, grenade, missile, or similar device; or

(iii) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone.

(g) He committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, he intentionally caused the death of a person, other than one of the participants; or

(h) In the commission of the offense, he knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(i) He committed the offense in an especially heinous, cruel, or depraved manner."

Sec. 4(6), Col. S.B. No. 46 (1974 sess.).

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute was approved in a referendum on November 5, 1974, and becomes effective on January 1, 1975.

CONNECTICUT

Connecticut provides the death penalty for some cases of "capitai felonies." "Capital felonies" are defined by Conn. Gen. Stat. § 53a-45 (3) (P.A. 73-137, [1973] Conn. Leg. Serv. 184 (West)) as (1) "murder" either (a) of policemen or other enumerated public officers in the line of duty, or (b) committed for "pecuniary gain," or (c) committed by one who was previously convicted of murder, or (d) committed by one who is presently serving a life sentence for any crime, or (e) of a kidnap victim, and (2) as "the illegal sale, for gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone, provided such seller was not, at the time of such sale, a drug-dependent person."

The punishment for a "capital felony" is either death or life imprisonment. Conn. Gen. Stat. § 53a-45(4)(e) (P.A. 73-137, [1973] Conn. Leg. Serv. 184 (West)). The choice between these alternative penalties is made by the trial judge or a jury after a separate, post-conviction sentencing hearing. Conn. Gen. Stat. § 53a-45(4)(b). (Such hearing is not held, however, if the State stipulates that no "aggravating factors" are present or that one or more "mitigating factors" are present. Conn. Gen. Stat. § 53a-45(4)(b)). The judge or jury must return a special verdict setting forth its findings as to the existence or non-existence of each of a number of specified aggravating and mitigating circumstances. Conn. Gen. Stat. § 53a-45(4)(b). The burden of establishing aggravating circumstances rests on the State, while the burden of establishing mitigating circumstances rests on the defendant. Conn. Gen. Stat. § 53a-45(4)(c). In neither case is the requisite quantum of proof stated.

If the jury or, if there is no jury, the court finds that one or more of the aggravating circumstances exists and that none of the mitigating circumstances exists, "the court shall sentence the defendant to death." If the jury or, if there is no jury, the court finds that none of the aggravating circumstances exists or that one or more of the mitigating circumstances exists, "the court shall impose the sentence for a class A felony [life imprisonment]." Conn. Gen. Stat. § 53a-45(e).

The following "aggravating circumstances" are set forth in Conn. Gen. Stat. § 53a-45(4)(g):

"(1) the defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the

commission or attempted commission of, a felony and he had previously been convicted of the same felony; or

(2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or

(3) the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(4) the defendant committed the offense in an especially heinous, cruel or depraved manner; or

(5) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; or

(6) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value."

The following "mitigating circumstances" are set forth in Conn. Gen. Stat. § 53a-45(4)(f):

"(1) [the defendant] . . . was under the age of eighteen or

(2) [the defendant's] . . . mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution or

(3) [the defendant] . . . was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution or

(4) [the defendant] . . . was criminally liable under sections 53a-8 and 53a-10 of the 1971 noncumulative supplement to the general statutes and section 53a-9 of the 1969 supplement to the general statutes for the offense, which was committed by another, but his participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution or

(5) [the defendant] . . . could not reasonably have foreseen that his conduct in the course of commission of the offense of which he was convicted would cause, or would create a grave risk of causing death to another person."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on October 1, 1973.

DELAWARE

Delaware provides the death penalty for first degree murder. H.B. No. 429, 127th General Assembly (March 29, 1974). "First degree" murder is defined by 11 Del. Code § 636 (1974) as a killing where a defendant:

"(1) . . . intentionally causes the death of another person;

(2) in the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom . . . recklessly causes the death of another person;

(3) intentionally causes another person to commit suicide by force or duress;

(4) . . . recklessly causes the death of a law enforcement officer, Corrections employee or fireman while such officer is in the lawful performance of his duties;

(5) . . . causes the death of another person by the use of or detonation of any bomb or similar destructive device;

(6) . . . with criminal negligence, causes the death of another person in the course of and in furtherance of the commission or attempted commission of rape, kidnapping, arson in the first degree, robbery in the first degree, or immediate flight therefrom;

(7) . . . causes the death of another person in order to avoid or prevent the lawful arrest of any person, or in the course of and in furtherance of the commission or attempted commission of escape in the second degree or escape after conviction."

"In any case in which a person is convicted of first degree murder the Court shall impose a sentence of death." 11 Del. Code §4209(1) (1974).

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on March 29, 1974.

FLORIDA

Florida provides the death penalty for some cases of first degree murder, (Fla. Stat. Ann. §782.04(1)(a)

(cum. supp. 1974)), and for some cases of rape committed by a person seventeen years of age or older upon a child under the age of eleven (Fla. Stat. Ann. §794.01(1) (cum. supp. 1974)).

The punishment for both of these crimes is either death or life imprisonment. Fla. Stat. Ann. §775.082(1). The choice between these alternative penalties is made ultimately by the trial judge after a separate, post-conviction sentencing hearing (although the sentencing proceeding may be conducted before either a judge or jury at the defendant's preference). If a jury has been requested, it renders to the court an advisory sentence as to

> "(a) Whether sufficient aggravating circumstances exist as enumerated in [921.141] subsection (6) and
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in [921.141] subsection (7) which outweigh aggravating circumstances found to exist, and
>
> (c) Based on these considerations whether the defendant should be sentenced to life or death."

Fla. Stat. Ann. §921.141(2). However, "[n]otwithstanding the recommendation of a majority of the jury," the trial judge has unfettered discretion to enter a sentence of life imprisonment or death. If he imposes a sentence of death, however, he must prepare a written report setting forth his findings as to the existence or non-existence of a number of specified aggravating and mitigating circumstances. In choosing between the alternative penalties of life and death, the court (like the jury) must weigh the aggravating and mitigating circumstances and determine which outweighs the other. Fla. Stat. Ann. §921.141(3). The burden of

establishing aggravating or mitigating circumstances is not allocated.

"If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082." Fla. Stat. Ann. §921.141(4). The statute provides for automatic review of a judgment of conviction and sentence of death in the Florida Supreme Court. Fla. Stat. Ann. §921.141(5). *See generally State v. Dixon*, 283 So.2d 1 (Fla. 1973).

The following "aggravating circumstances" are set forth in Fla. Stat. Ann. §921.141(6):

"(a) The capital felony was committed by a person under sentence of imprisonment;

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) The defendant knowingly created a great risk of death to many persons;

(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) The capital felony was committed for pecuniary gain;

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(h) The capital felony was especially heinous, atrocious or cruel."

The following "mitigating circumstances" are set forth in Fla. Stat. Ann. §921.141(7):

"(a) The defendant has no significant history of prior criminal activity;

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The victim was a participant in the defendant's conduct or consented to the act;

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(e) The defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(g) The age of the defendant at the time of the crime."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on December 8, 1972.

GEORGIA

Georgia provides the death penalty for some cases of aircraft hijacking, treason, murder, rape, armed robbery, and kidnapping.

The punishment for these crimes is either death or "imprisonment as provided by law." Ga. Code § 26-3102 (supp. 1973). The choice between these alternative penalties is made by the jury (or the trial judge if the defendant waived a jury). In cases of murder, rape, armed robbery or kidnapping, the choice is made after a separate, post-conviction sentencing hearing. In order to impose the death penalty for any of these crimes, the judge or jury must specifically designate (in writing) "the aggravating circumstance or circumstances which it found beyond a reasonable doubt." Ga. Code § 27-2534.1(c) (supp. 1973). The burden of establishing aggravating or mitigating circumstances is not allocated. Ga. Code § 27-2534.1(a) provides that a death sentence may be imposed "in any case" for the offenses of aircraft hijacking or treason, with no necessity for the trier of fact to make a specific finding of an "aggravating circumstance." *See also* Ga. Code § 26-3102. In such a case, the jury need only make a written "recommendation" of death in order to impose a death sentence. It is unclear from the statute whether a bifurcated trial is to be used for the trial of these crimes.

In any case where a death penalty is imposed, "the sentence shall be reviewed on the record by the Supreme Court of Georgia." Ga. Code § 27-2537(a). With regard to sentence, the Court is to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Ga. Code § 27-2537(c). The Supreme Court "shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

> "(1) Affirm the sentence of death; or
>
> (2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared hereinafter provided for, shall be provided to the resentencing judge for his consideration."

Ga. Code § 27-2537(e).

The following "aggravating circumstances" are set forth in Ga. Code § 27-2534.1(b):

> "(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

No list of "mitigating circumstances" is provided in the statute (Ga. Code §27-2531.1(b) states, however; that "the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances . . . otherwise authorized by law. . . .")

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on March 28, 1973.

IDAHO

Idaho provides the death penalty for first degree murder. Idaho Code §18-4004 (supp. 1973). "First degree murder" is defined by Idaho Code §18-4003 as "[a]ll murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful deliberate and premeditated killing," "[a]ny murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty, and is known or should be known by the perpetrator of the murder to be an officer so acting," and "[a]ny murder committed by a person under a sentence for murder of the first or second degree."

No new capital procedure is established.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on March 27, 1973.

ILLINOIS

The punishment for first degree murder is either death or life imprisonment. The choice between these alternative penalties is made by a panel of three judges, convened by the chief judge of the circuit, after a separate, post-conviction sentencing hearing. Ill. Rev. Stat. ch. 38, §9-1-(e) (1974). The panel must determine if any of the special circumstances warranting the death penalty exist. The burden of proving that the crime falls within one of the statutory categories for which a death sentence is authorized is on the State; and the State must prove this "beyond a reasonable doubt." Ill. Rev. Stat. ch. 38, §1005-8-1A (1974).

If a majority of the panel determines that any of the special circumstances occurred, "then the court shall sentence the defendant to death unless a majority of the judges of such court determines that there are compelling reasons for mercy and that the defendant should not be sentenced to death." Ill. Rev. Stat. ch. 38, §1005-8-1A (1974). In cases where the death sentence is imposed, a special two stage appeal is provided:

> "In the first stage, the case shall be considered as are all other criminal appeals and the court shall determine whether there are errors occurring at the trial of the case which require that the findings of the trial court be reversed or modified. If the appellate court, in the second stage of the appeal, finds any evidence that the sentence of death was the result of discrimination, the appellate court shall modify the sentence to life imprisonment.
>
> In determining whether there is evidence of discrimination in sentencing the defendant to death, the appellate court shall consider whether the death sentence, considering both the crime and the defendant was disproportionate or the result of discrimination based on race, creed, sex or economic status."

Ill. Rev. Stat. ch. 38, 1005-8-1A (1974).

The following special circumstances are set forth in Ill. Stat. ch. 38, 1005-8-1A (1974):

> "(1) The murdered individual was a peace officer or fireman killed in the course of performing his official duties; or
>
> (2) The murdered individual was an employee of an institution or facility of the Department of Corrections, or its successor agency, killed in the course of performing his official duties, or was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or
>
> (3) Such person has been convicted of murdering two or more individuals under Section 9-1 of the Criminal Code of 1961, as amended, or under any law of the United States or of any State which is substantially identical to Subsection (a) of Section 9-1 of the Criminal Code of 1961, as amended, regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts; or

(4) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

(5) The person committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder; or

(6) The murdered individual was killed in the course of a robbery, rape, aggravated kidnapping, arson or when death occurs following the commission of indecent liberties with a child by a party to the crime."

No list of "mitigating circumstances" (the "compelling reasons for mercy" [Ill. Rev. Stat. ch. 38, § 1005-8-1A (1974)]) is provided in the statute.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases although plea bargaining is regulated in other ways by Ill. Rev. Stat. ch. 110A § 402 (1971). The Governor's clemency power in capital cases is left unaltered.

This statute became effective on July 1, 1974.

INDIANA

Indiana provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. Ind. Ann. Stat. § 10-3401 (a) (supp. 1973). No new capital trial procedure is established. The penalty for first degree murder is life

imprisonment unless one of the circumstances enumerated in Ind. Ann. Stat. § 10-3041(b) (supp. 1973) is found to exist.

The following special circumstances are set forth in Ind. Ann. Stat. § 10-3401(b) (supp. 1973):

"(1) Killing purposely and with premeditated malice a police officer, corrections employee or fireman acting in line of duty.

(2) Killing a human being by the unlawful and malicious detonation of an explosive.

(3) Killing a human being while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary by a person who has had a prior unrelated conviction of rape, arson, robbery, or burglary.

(4) Killing a human being while perpetrating or attempting to perpetrate a kidnapping.

(5) Killing a human being while perpetrating or attempting to perpetrate any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft, train, bus, ship, or other commercial vehicle.

(6) Killing a human being purposely and with premeditated malice:

(i) by a person lying in wait;

(ii) by a person hired to kill;

(iii) by a person who has previously been convicted of murder; or

(iv) by a person who is serving a life sentence."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. While the statute provides that an indictment under § 10-3041(b) may not charge a lesser included offense,

it explicitly provides that "in all situations to which this subsection applies, the jury, or the trial judge if there be no jury, may find the defendant guilty of second degree murder or voluntary or involuntary manslaughter." Ind. Ann. Stat. § 10-3401(b) Plea bargains to lesser included offenses are not prohibited in capital cases; and the Governor's clemency power in capital cases is left unaltered.

This statute became effective on April 24, 1973.

KENTUCKY

Kentucky provides the death penalty for kidnapping where the defendant does not "voluntarily release the victim alive, substantially unharmed, and in a safe place prior to trial" (Sec. 76(2) of the new Kentucky criminal code [H.B. No. 232, Reg. Sess. 1974, amending Ky. Rev. Stat. c. 507]), and for some cases of murder [Sec. 61(2) of the new Kentucky criminal code (H.B. No. 232, Reg. Sess. 1974, amending Ky. Rev. Stat. c. 507)]. Kidnapping is defined by § 76(1) as the unlawful restraint of another person with intent:

"(a) To hold him for ransom or reward; or

(b) To accomplish or to advance the commission of a felony; or

(c) To inflict bodily injury or to terrorize the victim or another; or

(d) To interfere with the performance of a governmental or political function; or

(e) To use him as a shield or hostage."

The punishment for murder is either death or imprisonment for twenty years to life. The punishment is life unless one of the following circumstances exists:

"(a) The defendant's act of killing was intentional and was for profit or hire;

(b) The defendant's act of killing was intentional, and occurred during the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, or rape in the first degree;

(c) The defendant's act of killing was intentional and the defendant was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties;

(d) The defendant's act of killing was intentional and the death was caused through use of a destructive device, as defined in KRS 237.030(1); or

(e) The defendant's act or acts of killing were intentional and resulted in multiple deaths.

(f) The defendant's act of killing was intentional and the victim was a police officer, sheriff or deputy sheriff engaged at the time of the act in the lawful performance of his duties."

Sec. 61(a) of the new Kentucky criminal code (H.B. No. 232, Reg. Sess. 1974, amending Ky. Rev. Stat. c. 507).

No new capital procedure is established. "When a person is convicted of a capital offense he shall have his punishment fixed at death. However, any crime classified as a capital offense may at the discretion of the state be prosecuted as a Class A felony, provided such election to so prosecute is made at the time of indictment." Sec. 275(1) of the new Kentucky criminal

code (H.V. No. 232, Reg. Sess. 1974, amending Ky. Rev. Stat. Chap. 507).

No other standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute becomes effective on January 1, 1975.

LOUISIANA

Louisiana provides the death penalty for first degree murder (La. Rev. Stat. Ann. § 14:30 (supp. 1974)), for "aggravated rape" (La. Rev. Stat. Ann. § 14:42), for treason (La. Rev. Stat. Ann. § 14:113), and for "aggravated kidnapping" (La. Rev. Stat. Ann. § 14:44). "First degree" murder is defined by La. Rev. Stat. Ann. § 14:30 (Supp. 1974) as "the killing of a human being:

> "(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
>
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
>
> (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person,
>
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder."

"Aggravated rape" is defined by La. Rev. Stat. Ann. § 14:22 as:

> "a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:
>
> (1) Where the female resists the act to the utmost, but her resistance is overcome by force.
>
> (2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.
>
> (3) Where she is under the age of twelve years. . . ."

"Treason" is defined by La. Rev. Stat. Ann. § 14:113 as:

> "the levying of war against the United States or the State of Louisiana, adhering to enemies of the United States or the State of Louisiana, or giving such aid and comfort."

"Aggravated kidnapping" is defined by La. Rev. Stat. Ann. § 14:44 as:

> "the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:

(1) The forcible seizing and carrying of any person from one place to another; or

(2) The enticing or persuading of any person to go from one place to another; or

(3) The imprisoning or forcible secreting of any person."

This section also provides that if the kidnap victim is liberated unharmed before sentence is imposed, the death sentence may not be imposed.

Article 817 of the Louisiana Code of Criminal Procedure provides that in a capital case, a jury may not make "[a]ny qualification . . . or addition to a verdict of guilty beyond a specification of the offense as to which the verdict is found."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Article 598 of the Louisiana Code of Criminal Procedure permits conviction of lesser included offenses in a capital case; and Article 814 specifies the "responsive verdicts" which may be returned in any capital case: in first degree murder cases–guilty, guilty of second degree murder, guilty of manslaughter, not guilty (Art. 814(A)(1)); in aggravated rape cases–guilty, guilty of attempted aggravated rape, guilty of simple rape, not guilty (Art. 814(A)(8)); in aggravated kidnapping cases–guilty, guilty of simple kidnapping, not guilty (Art. 814(A)(15)). No "responsive verdicts" are specified for treason cases. While Article 557 prohibits guilty pleas to capital charges, negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

These statutes were or became effective on July 2, 1973.

MISSISSIPPI

Mississippi provides the death penalty for unlawful carnal knowledge of a female under the age of 12 by a person of the age of 18 or older (Miss. Code § 97-3-65, as amended by S.B. No. 2341, Reg. Sess. 1974, § 8), for aircraft piracy (defined as "the seizure or exercise of control, by force or violence or threat of force or violence, of any aircraft within the airspace jurisdiction of the State . . ." [S.B. No. 2341, Reg. Sess. 1974 § 2], and for "capital murder" (Miss. Code § 97-3-21, as amended by S.B. No. 2341, Reg. Sess. 1974, § 7). "Capital murder" is defined by Miss. Code § 97-3-19(2), as amended by S.B. No. 2341, Reg. Sess. 1974, § 6, as "the killing of a human being without the authority of law . . . in the following cases:

(a) murder which is perpetrated by killing a peace officer [as defined] or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman . . . ;

(b) murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) when done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. A capital charge must be alleged by citation of the relevant statutory section in the indictment; and, when a capital charge is so alleged, the judge "shall grant no instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment." (Miss. Code §97-3-19(3), as amended by S.B. No. 2341, Reg. Sess. 1974, §6.) Negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on April 23, 1974.

MONTANA

Montana provides the death penalty for some cases of "aggravated kidnapping" (those in which "the victim is dead as a result of the criminal conduct") [Mont. Rev. Codes Ann. §94-5-304, as amended, c. 126, 43rd Legislative Assembly (March 13, 1974)], and for some cases of "deliberate homicide" (Mont. Rev. Codes Ann. §94-5-102(2)). "Deliberate homicide" is defined by Mont. Rev. Codes Ann. §94-5-102(1) as a criminal homicide which

"(a) . . . is committed purposely or knowingly; or

(b) . . . is committed while the offender is

engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnaping, felonious escape or any other felony which involves the use or threat of physical force or violence against any individual."

Montana Revised Codes Annotated §94-5-103 provides that what would otherwise be "deliberate homicide" is "mitigated deliberate homicide," punishable by up to forty years imprisonment, "when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation."

The punishment for a "deliberate homicide" is either death or "imprisonment in the state prison for any term not to exceed one hundred (100) years." Mont. Rev. Codes Ann. §94-5-102(2). The death sentence is to be imposed by the court if the "deliberate homicide" involves one of the circumstances enumerated in Mont. Rev. Codes Ann. §94-5-105(1). No procedure is set forth for finding these circumstances, and the burden of establishing them is not allocated. Mont. Rev. Codes Ann. §94-5-105(1) (Spec. Crim. Code Supp. 1973), as amended, c. 262, 43rd Legislative Assembly (March 21, 1974) provides that "[W]hen a defendant is convicted of the offense of deliberate homicide the court shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:

(a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or

(b) The defendant was previously convicted of another deliberate homicide; or

(c) The deliberate homicide was committed by means of torture; or

(d) The deliberate homicide was committed by a person lying in wait or ambush; or

(e) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person."

"Mitigating circumstances" are not defined by statute.

Mont. Rev. Codes Ann. §94-5-105(2) (Spec. Crim. Code Supp. 1973), as amended, c. 262 43rd Legislative Assembly (March 21, 1974), provides that "[n]ot withstanding the provisions of subsection (1) and regardless of circumstances, when a defendant is convicted of the offense of deliberate homicide under subsection (1)(a) of section 94-5-102 in which the victim was a peace officer killed while performing his duty the court shall impose a sentence of death."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on January 1, 1974, with amendments effective on March 11, 1974, and July 1, 1974.

NEBRASKA

Nebraska provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. The choice between these alternative penalties is made by a judge or panel of judges after a separate, post-conviction sentencing hearing. Neb. Rev. Stat. §29-2522 (supp. 1973). The judge or judges must return a special verdict setting forth his or their findings as to the existence or non-existence of a number of specified aggravating and mitigating circumstances. Neb. Rev. Stat. §29-2522(2) (supp. 1973). The burden of establishing aggravating or mitigating circumstances is not allocated. In determining whether to impose a life or death sentence, the judge or judges must consider:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; or

(2) Whether sufficient litigating circumstances exist which approach or exceed the weight given to the aggravating circumstances.

Automatic review of death sentences in the Nebraska Supreme Court is provided by Neb. Rev. Stat. §29-2524, and this section also authorizes that Court to reduce death sentences to sentences of life imprisonment.

The following "aggravating circumstances" are set forth in Neb. Rev. Stat. §29-2523(1):

"(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a

substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender of another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws."

The following "mitigating circumstances" are set forth in Neb. Rev. Stat. §29-2523(2):

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on April 20, 1973.

NEVADA

Nevada provides the death penalty for "capital murder", Nev. Rev. Stat. § 200-030(5) (1973). "Capital murder" is defined by Nev. Rev. Stat. § 200-030(1) as "murder" which is perpetrated by:

"(a) Killing a peace officer or fireman:

(1) While such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity; and

(2) With knowledge that the victim is or was a peace officer or fireman.

(b) A person who is under sentence of life imprisonment without possibility of parole;

(c) Executing a contract to kill. For purposes of this paragraph 'contract to kill' means an agreement, with or without consideration, whereby one or more of the parties to the agreement commits murder. All parties to a contract to kill are guilty as principals;

(d) Use or detonation of a bomb or explosive device;

(e) Killing more than one person as the result of a common plan, scheme or design."

First Degree murder, punished by life imprisonment, is "Murder which is:

(a) Perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premediated killing;

(b) Committed in the perpetration or attempted perpetration or rape, kidnapping, arson, robbery, burglary or sexual molestation of a child under the age of 14 years; or

(c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody."

Nev. Rev. Stat. § 200-030(2). Murder of the second degree, punishable by not less than five years imprisonment, is all other kinds of murder. Nev. Rev. Stat. § 200-030(3).

"The jury before whom any person indicted for murder is tried shall, if they find such person guilty thereof, designate by their verdict whether such person is guilty of capital murder or murder of the first or second degree." Nev. Rev. Stat. § 200-030(4) (1973).

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on July 1, 1973.

NEW HAMPSHIRE

New Hampshire provides the death penalty for "capital murder." N.H. c. 34, 1974 General Court Spec. Sess. (April 3, 1974) amending N.H. Rev. Stat. Ann., § 630:1 (I). "Capital murder" is defined by c. 34, 1974 General Court Spec. Sess. (April 3, 1974) amending N.H. Rev. Stat. Ann., § 630, as "knowingly causing the death of:

(a) A law enforcement officer [as defined] acting in the line of duty;

(b) Another before, after, while engaged in the commission of, or while attempting to commit kidnapping as that offense is defined in RSA 633:1;

(c) Another by criminally soliciting a person to cause said death or after having been criminally solicited by another for his personal pecuniary gain."

No new capital procedure is provided.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on April 15, 1974.

NEW MEXICO

New Mexico provides the death penalty for "first degree" murder. N.M. Stat. Ann. §§40A-2-1, 40A-20-2 (supp. 1973). "First degree" murder is defined by N.M. Stat. Ann. §40A-2-1 as any murder perpetrated:

> "(1) by any kind of willful, deliberate and premediated killing;
>
> (2) by means of poison, lying in wait or torture;
>
> (3) in the commission of or attempt to commit any felony;
>
> (4) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life; or
>
> (5) from a deliberate and premediated design unlawfully and maliciously to effect the death of any human being.

Second degree murder "consists of all other murder," N.M. Stat. Ann. §40A-2-1(B) committed with "malice" but without "premeditation" or "deliberation". *Torres v. State*, 39 N. Mex. 191, 43 P.2d 929, 930-931 (1935). Manslaughter is defined as "the unlawful killing of a human being without malice." N.M. Stat. Ann., §40A-2-3.

"When a defendant has been convicted of a capital felony, the judge shall sentence that person to death." N.M. Stat. Ann., §40A-29-2 (supp. 1973). However, New Mexico utilizes an "open" indictment for murder (N.M. R. Crim. Proc. 5(d) (N.M. Stat. Ann., §41-23-5(d)), and N.M. R. Crim. Proc. 8 (N.M. Stat. Ann., §41-23-8)), and the jury determines the degree of

the homicide, *see State v. Burrus*, 38 N. Mex. 293 462, 35 P.2d 285, 289-290 (1934); *State v. Bentford*, 39 N. Mex. 293, 46 P.2d 658 (1935); *State v. Wickman*, 29 N.M. 198, 43 P.2d 933 (1935); *State v. Horton*, 59 N.M. 257, 258 P.2d 371 (1953). The jury must ordinarily decide in a homicide case whether a defendant is guilty of first degree murder, second degree murder, or manslaughter.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on March 20, 1973.

NEW YORK

New York provides the death penalty for "murder in the first degree." "First degree" murder is defined by Penal Law §125.27, added by §5 of S. 21028 (Cal. No. 1548) (Ass. B. 11474-A), N.Y. Laws 1974, as a crime in which a person, who is over eighteen years old, "[w]ith intent to cause the death of another person . . . causes the death of such person; and [e]ither:

> (i) the victim was a police officer . . . [as defined] who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known, that the victim was a police officer; or

(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional facility . . . [as defined] who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institutional or a local correctional facility; or

(iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the maximum of which was natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody."

"When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death." Penal Law §60.06 (added by S. 21028 (Cal. No. 1548) (Ass. B 11474-A), N.Y. Laws 1974). However, Penal Law §125.27(2) provides that for any prosecution for murder in the first degree, "it is an affirmative defense that:

"(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph

shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude the conviction of, manslaughter in the second degree or any other crime except murder in the second degree."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. While a defendant is not allowed to enter a plea of guilty to murder in the first degree (Penal Law §§220.10(6), as amended by §10 of S. 21028 (Cal. No. 1548) (Ass. B. 11474-A), N.Y. Laws 1974), convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on September 1, 1974.

NORTH CAROLINA

North Carolina provides the death penalty for "first degree" murder (§1, c. 1201, S.B. 157, 1973 Session (2d Session, 1974)) amending N.C. Gen. Stat. §14-17 (repl. vol. 1969), and for "first degree" rape (§2, c. 1201, S.B. 157, 1973 Session (2d Session 1974)) amending N.C. Gen. Stat. §1421 (repl. vol. 196). "First

degree" murder is defined by §1, c. 1201, S.B. 157, 1973 Session (2d Session, 1974) as "[a] murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony." "First degree" rape is defined by §2, Chap. 1201, S.B. 157, 1973 Session (2d Session 1974) as a rape by a person more than sixteen years old upon "a virtuous female child under the age of twelve years" or as a rape in which "the rape victim [regardless of age] had her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her."

No new capital procedure is provided.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on April 8, 1974.

OHIO

Ohio provides the death penalty for some cases of "aggravated murder."

The punishment for aggravated murder is either death or life imprisonment. Ohio Rev. Code Ann. §2929.02(A) (Page Spec. Supp. 1973). The choice between these alternative penalties is made by the trial

judge (or by a three judge panel if the defendant waived a jury trial and was tried by a three judge panel) after a separate, post-conviction sentencing hearing. Ohio Rev. Code Ann. §2929.03(C) (Page Spec. Supp. 1973). If the jury finds a defendant guilty of murder and if the indictment contained an allegation of an "aggravating circumstance", then the trial judge (or the three judge panel where the defendant has waived a jury trial) is to pronounce a death sentence unless he determines that one of the enumerated mitigating circumstances exist. The burden of establishing aggravating circumstances rests on the State, and their existence must be established at trial "beyond a reasonable doubt." Ohio Rev. Code Ann. §2929.04(A) (Page Spec. Supp. 1973). Despite the proof beyond a reasonable doubt of one of the aggravating circumstances, the death penalty is precluded if one or more of the enumerated mitigating circumstances is established by "a preponderance of the evidence." Ohio Rev. Code Ann. §2929.04(B) (Page Spec. Supp. 1973).

The following "aggravating circumstances" are set forth in Ohio Rev. Code Ann. §2929.04(A)(Page Spec. Supp. 1973):

> "(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detention, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravating robbery, or aggravated burglary."

The following "mitigating circumstances" are set forth in Ohio Rev. Code Ann. §2929.04(B) (Page Spec. Supp. 1973):

"(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency,

though such condition is insufficient to establish the defense of insanity."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas of lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on December 22, 1972.

OKLAHOMA

Oklahoma provides the death penalty for first degree murder. Okla. Stat. tit. 21, §701.3. "First degree" murder is defined by Okla. Stat. tit. 21, §701.1, as "[h]omicide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, . . ." in the following cases:

"1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;

2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;

3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of the witness, or

when perpetrated against any human being while intending to kill such witness;

4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

7. Murder by a person under a sentence of life imprisonment in the penitentiary;

8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

In a jury trial, "the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilt shall so indicate on their verdict and state affirmatively in their

verdict that the defendant shall suffer death." Okla. Stat. tit. 21, § 701.3. In a bench trial or after a guilty plea, the judge determines whether the defendant is guilty of first degree murder and, if so, "shall enter a judgment and sentence of death." *Ibid.*

When reviewing a death sentence, the Court of Criminal Appeals (if "there are no errors of law in the record requiring a reversal or modification") must conduct

> "an evidentiary hearing, the purpose of which will be to determine if the sentence of death comports with the principles of due process and equal protection of the law. Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Okla. Stat. tit. 21, § 701.5. If the Court determines "that the sentence of death is discriminatory or is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, [it]. . .shall modify the sentence of death to life in the penitentiary at hard labor." Okla. Stat. tit. 21, § 701.6.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. "In a jury trial, nothing in [the] . . . section [punishing first degree murder with death and providing that the jury shall determine only whether the defendant is guilty or not guilty of first degree murder] shall preclude the

trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions; but in every instance where an instruction authorizes the jury to consider lesser and included offenses and lesser degrees of homicide, the judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial." Okla. Stat. tit. 21, §701.3. Negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on May 17, 1973.

PENNSYLVANIA

Pennsylvania provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. Pa. Act No. 46, 158th General Assembly (March 26, 1974) enacting tit. 18, c. 13, §1311(d). The choice between these alternative penalties is made by the jury after a separate, post-conviction sentencing hearing. The jury must return its verdict based on its findings as to the existence or non-existence of specified aggravating and mitigating circumstances. The burden of establishing aggravating circumstances rests on the State, and their existence must be established beyond a reasonable doubt. Mitigating circumstances must be proved by a preponderance of the evidence. Pa. Act No. 46, 158th General Assembly (March 26, 1974) enacting tit. 18, c. 13, §1311(c)).

In determining whether to impose a life or death sentence, agreement by the jury upon aggravating or mitigating circumstances must be unanimous, and if the jury is unable to agree, the court is directed to impose a sentence of life imprisonment. If the jury finds at least one aggravating circumstance and no mitigating circumstances, the court is to impose a death sentence. *Id.*, enacting tit. 18, c. 13 §1311(d). If the jury finds at least one mitigating circumstance or if it finds no aggravating or mitigating circumstances, a sentence of life imprisonment is to be imposed. *Id.*, enacting tit. 18, c. 13, §1311(d). Automatic review of death sentences in the Pennsylvania Supreme Court is provided. *Id.*, enacting tit. 18, c. 13. §1311(g).

The following "aggravating circumstances" are set forth in Pa. Act. No. 46, 158th General Assembly (March 26, 1974) enacting tit. 18, c. 13, §1311(d)(1):

"(i) The victim was a fireman, peace officer or public servant concerned in official detention as defined in section 5121 of this title (relating to escape), who was killed in the performance of his duties.

(ii) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(iii) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(iv) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(v) The victim was a witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(vi) The defendant committed a killing while in the perpetration of a felony.

(vii) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(viii) The offense was committed by means of torture.

(ix) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense."

The following "mitigating circumstances" are set forth in Pa. Act. No. 46, 158th General Assembly (March 26, 1974) enacting tit. 18, c. 13, §1311(d)(2):

"(i) The age, lack of maturity, or youth of the defendant at the time of the killing.

(ii) The victim was a participant in or consented to the defendant's conduct as set forth in section 1311(d) of this title or was a participant in or consented to the killing.

(iii) The defendant was under duress although not such duress as to constitute a defense to prosecution. . . ."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on March 26, 1974.

RHODE ISLAND

Rhode Island provides the death penalty for murder committed by a prison inmate. Rhode Island General Laws Annotated §11-23-2 (Supp. 1973) provides that "[e]very person who shall commit murder while committed to confinement to the adult correctional institutions or the state reformatory for women shall be punished by death. The punishment of death shall be inflicted by the administration of a lethal gas."

No new capital procedure is provided.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on June 26, 1973.

SOUTH CAROLINA

South Carolina provides the death penalty for some cases of murder.

The punishment for murder is either death or life imprisonment. Section 1 of Act 1109 (R. 1276, S. 270), S.C. Laws 1974, amending S.C. Code § 16-52 (1962). The death penalty is imposed on those found guilty of murder under specified circumstances. Life imprisonment is imposed on all other types of murder. No new capital procedure is provided.

Section 3 of this Act provides that "[t]he Supreme Court shall review each conviction of a capital offense by any court in this State."

The following circumstances requiring the death penalty are set forth in Section 1 of Act 1109 (R. 1276, S. 270), S.C. Laws 1974, amending S.C. Code § 16-52 (1962):

> (1) Murder committed while in the commission of the following crimes or acts: (a) rape; (b) assault with intent to ravish; (c) kidnapping; (d) burglary; (e) robbery while armed with a deadly weapon; (f) larceny with use of a deadly weapon; (g) housebreaking; (h) killing by poison; (i) lying in wait.
>
> (2) Murder committed for hire based on some consideration of value.
>
> (3) Murder of a law enforcement officer or correctional officer while acting in the line of duty.
>
> (4) The person convicted of committing the murder has previously been convicted of murder, or was convicted of commiting more than one murder.
>
> (5) Murder that is willful, deliberate and premeditated."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on July 2, 1974.

TENNESSEE

Tennessee provides the death penalty for rape of a victim under 12 years of age (Tenn. Code Ann. § 39-3702, as amended by Public Chap. 461, Tenn. Laws 1974) and for first degree murder (Tenn. Code Ann. § 39-2402, as amended by Public Chap. 462, Tenn. Laws 1974). "First degree" murder is defined by Tenn. Code Ann. § 39-2402, as amended by Public Chap. 462, Tenn. Laws 1974, as an act committed by an individual wherein:

> (1) he commits a willful, deliberate, malicious and premeditated killing or murder;
>
> (2) he commits a willful, deliberate and malicious killing or murder, and:
>
> (a) the victim is an employee of the Department of Correction having custody of the actor,
>
> (b) the victim is a prison inmate in custody with the actor,
>
> (c) the victim is known to the actor to be a peace officer or fireman acting in the course of his employment,
>
> (d) the victim is a judge acting in the course of his judicial duties,

(e) the victim is a popularly elected public official,

(f) the offense is committed for hire; or attempting to evade law enforcement officials.

(3) he hires ahother to commit a willful, deliberate, malicious and premediated killing or murder, and such hiring causes the death of the victim; or

(4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb."

"When a person is convicted of the crime of murder in the first degree, or as an accessory before the fact of such a crime, it shall be the duty of the jury convicting him in their verdict to fix his punishment at death as provided by law." Tenn. Code Ann. §39-2406, as amended by Public Chap. 462, Tenn. Laws 1974.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

These statutes became effective on February 27, 1974.

TEXAS

Texas provides the death penalty for some cases of "capital murder." "Capital murder" is defined by Tex. Pen. Code § 19.03(a) as a killing where:

"(1) The person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) The person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) The person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) The person commits the murder while escaping or attempting to escape from a penal institution; or

(5) The person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution."

The punishment for "capital murder" is either death or life imprisonment. The choice between these alternative penalties is made by a jury after the trial in a separate sentencing hearing. Tex. Code Crim. Proc. Art. 37.071(a). At this post-conviction hearing, the jury must return a special verdict setting forth its findings on three specified issues:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

Tex. Code Crim. Proc. Art. 37.071(b).

The State must prove each of these three issues beyond a reasonable doubt (Tex. Code Crim. Proc. Art. 37.071(c)), and the jury must unanimously return a "yes" answer to each of these issues to impose a death sentence. Ten "no" votes on any one of the issues are sufficient to prevent the imposition of a death sentence. Tex. Code Crim. Proc. Art. 37.071(d).

"If the jury returns an affirmative finding on each issue submitted . . . the court shall sentence the defendant to death. If the jury returns a negative finding on any issue . . . the court shall sentence the defendant to confinement in the Texas Department of Corrections for life." Tex. Code Crim. Proc. Art. 37.071(e).

Automatic review of death sentences is provided in the Texas Court of Criminal Appeals. Tex. Code Crim. Proc. Art. 37.071(f).

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. In a "capital murder" case, the jury is given explicit power to convict of "capital murder," "murder," or "any other lesser offense." Tex. Pen. Code § 19.03(c). Negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on June 14, 1973.

UTAH

Utah provides the death penalty for some cases of first degree murder and for some cases of "aggravated kidnappings," crimes which are deemed to be "capital felonies". "First degree" murder is defined by Utah Code Ann. § 76-5-202(1) as an act in which "the actor intentionally or knowingly causes the death of another under any of the following [aggravating] circumstances:

(a) The homicide was committed by a convict under sentence of imprisonment.

(b) At the time the homicide was committed the actor also committed another homicide.

(c) The actor knowingly created a great risk of death to a person other than the victim and the actor.

(d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape, forcible sodomy, or aggravated sexual assault or arson, burglary, or kidnapping.

(e) The homicide was committed for the purpose of avoiding or preventing an arrest by a peace officer acting under color of legal authority or for the purpose of effecting an escape from lawful custody.

(f) The homicide was committed for pecuniary or other personal gain.

(g) After having previously been convicted of first or second degree murder.

(h) The homicide was committed upon a child under the age of twelve years as the result of physical abuse or neglect."

"Aggravated kidnapping" is defined by Utah Code Ann. § 76-5-302 as an act in which a person "intentionally or knowingly, by force, threat, or deceit, detains or restrains another against his will with intent:

> (a) To hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;
>
> . (b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or
>
> (c) To inflict bodily injury on or to terrorize the victim or another; or
>
> (d) To interfere with the performance of any governmental or political function."

Aggravated kidnapping is reduced to "a felony of the first degree" (rather than a "capital felony") if the victim is released "alive and in a safe place before trial." Utah Code Ann. § 76-5-302(3).

The punishment for "capital felonies" is either death or life imprisonment. Utah Code Ann. § 76-3-207(2). The choice between these alternative penalties is made by the trial judge or jury after a separate, post-conviction sentencing hearing. Utah Code Ann. § 76-3-207(1). The judge or jury must render a decision as to whether the death sentence is to be imposed after weighing the aggravating and mitigating circumstances. The statute provides no formula for weighing aggravating factors against mitigating ones, and the burden of establishing aggravating or mitigating circumstances is not allocated.

"If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury

and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death, the court shall discharge the jury and impose the sentence of life imprisonment." Utah Code Ann. § 76-3-207(2).

The Utah Supreme Court is authorized to review the appropriateness of death sentences, and "if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of life imprisonment." Utah Code Ann. § 76-3-207(3).

"Aggravating circumstances" include those enumerated in the definition of first degree murder (Utah Code Ann. § 76-5-202(1)).

The following "mitigating circumstances" are set forth in Utah Code Ann. § 76-3-207(1):

> "(a) The defendant has no significant history of prior criminal activity;
>
> (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> (c) The defendant acted under extreme duress or under the substantial domination of another person;
>
> (d) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental disease, intoxication, or influence of drugs;
>
> (e) The youth of the defendant at the time of the crime;

(f) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(g) And any other fact in mitigation of the penalty."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on July 1, 1973.

WYOMING

Wyoming provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. Death is imposed "if the trier of fact finds the [murder in the first degree]... involve[d] the following course of conduct:

(i) Murder of any peace officer, corrections employee or fireman acting in the line of duty;

(ii) A murder committed for profit or reward of any kind by a defendant after being hired by any person, or the employment or inducement of another to commit murder;

(iii) Intentional murder by the unlawful and malicious use or detonation of any explosive;

(iv) Murder committed by a person who had previously been convicted of murder in the first or second degree;

(v) Murder committed by a defendant while under the sentence of life imprisonment;

(vi) Murder committed in the perpetration of or attempt to perpetrate a rape where the defendant had previously been convicted of rape; murder committed in the perpetration of or attempt to perpetrate arson where the defendant had previously been convicted of arson; murder committed in the perpetration of or attempt to perpetrate a robbery where the defendant had previously been convicted of a robbery; murder committed in the perpetration of or attempt to perpetrate a burglary where the defendant had previously been convicted of a burglary;

(vii) Murder of any person perpetrated in the course of a kidnapping;

(viii) Murder in the course of the hijacking of a commercial airplane, train, bus, boat or other commercial vehicle;

(ix) Murder committed by a defendant to conceal his identity or to conceal the fact of the commission of a crime, or to suppress evidence;

(x) Murder of two or more persons in one series of related events."

Wyo. Stat. Ann. § 6-54(b) (supp. 1973).

It appears that the guilt and sentence determination will ordinarily be made simultaneously, since Wyo. Stat. Ann. § 6-54(c) (supp. 1973) provides that only for the courses of conduct specified in sub-sections (iv), (v), and (vi) of Wyo. Stat. Ann. § 6-54(b) (supp. 1973) will the determination relevant to sentence (that the defendant had a prior conviction) be made at a separate, post-conviction proceeding.

Automatic review of death sentences is provided in the Wyoming Supreme Court. Wyo. Stat. Ann. § 6-54(d) (supp. 1973).

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on February 24, 1973.

APPENDIX B

NORTH CAROLINA DEFENDANTS SENTENCED TO DEATH UNDER THE PROCEDURES ESTABLISHED BY STATE v. WADDELL

1. *Henry N. Jarrette*: Union County Super. Ct. Nos. 73-Cr-1342, 73-Cr-1339, 73-Cr-2843, 73-Cr-1341 (June 21, 1973) (death sentence for first degree murder and rape); aff'd 284 N.C. 625, 202 S.E.2d 721 (1974); *pending on petition for cert.*, U.S. Sup. Ct. No. 73-6877 (filed June 11, 1974).
2. *Albert Crowder, Jr.*: Wake County Super. Ct. No. 73-Cr-14190 (July 18, 1973) (death sentence for first degree murder); *aff'd* 285 N.C. 42, 203 S.E.2d 38 (1974); pending on *petition for cert.*, U.S. Sup. Ct. No. 73-6878 (filed June 11, 1974).
3. *David Earl Dillard*: Robeson County Super. Ct. No. 73-Cr-5807 (Aug. 1, 1973) (death sentence for first degree murder); *aff'd* 285 N.C. 203 S.E.2d 5 (1974); *pending on petition for cert.*, U.S. Sup. Ct. No. 74-6875 (filed June 11, 1974).
4. *Tommy Noell*: Orange County Super. Ct. No. 73-Cr-4142 (Aug. 3, 1973) (death sentence for rape); *aff'd* 284 N.C. 670, 202 S.E.2d 750 (1974); *pending on petition for cert.*, U.S. Sup. Ct. No. 73-6876 (filed June 11, 1974).
5. *Isaac Sherill Monk*: New Hanover County Super. Ct. No. 73-Cr-5871 (Aug. 1973) (death sentence for first degree murder); *appeal pending* N.C. Sup. Ct. No. 34 (Fall Term, 1973).

6. *Alton James Henderson*: Alamance County Super. Ct. No. 73-Cr-7771 (Sept. 5, 1973) (death sentence for first degree burglary and rape); *aff'd* 285 N.C. 1, 203 S.E.2d 10 (1974); *pending on petition for cert.*, U.S. Sup. Ct. No. 73-6853 (filed June 8, 1974).

7. *Jesee Thurman Fowler*: Wake County Super. Ct. No. 73-Cr-41907 (Sept. 24, 1973) (death sentence for first degree murder); *aff'd* 285 N.C. 90, 203 S.E.2d 803 (1974); *cert. granted* Oct. 29, 1974, U.S. Sup. Ct. No. 73-7031.

8. *Billy Honeycutt*: Duplin County Super. Ct. No. 73-Cr-3822 (Oct. 5, 1973) (death sentence for first degree murder) *aff'd* 285 N.C. 184, 203 S.E.2d 844 (1974); *pending on petition for cert.*, U.S. Sup. Ct. No. 73-7032 (filed July 9, 1974).

9. *Mamie Lee Ward*: Edgecombe County Super. Ct. No. 73-Cr-6706 (Sept. 19, 1973) (death sentence for first degree murder); *appeal pending*, N.C. Sup. Ct. No. 30 (Spring Term, 1974).

10. *Mickey Bell*: Robeson County Super. Ct. No. 73-Cr-12351 (Oct. 18, 1973) (death sentence for first degree murder); *appeal pending*, N.C. Sup. Ct. No. 27 (Spring Term, 1975).

11. *Kelly Dean Sparks*: Guilford County Super. Ct. No. 73-Cr-19776 (Nov. 1, 1973) (death sentence for first degree murder); *aff'd* _____ N.C. _____, 207 S.E.2d 71 (1974).

12. *Earl Jerome White*: Alamance County Super. Ct. No. 73-Cr-12672 (Dec. 6, 1973)(Death sentence for first degree murder); *appeal pending*, N.C. Sup. Ct. No. 83 (Spring Term, 1974).

13. *Vernon Brown*: Edgecombe County Super. Ct. No. 73-Cr-7378 (Dec. 9, 1973) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 15 (Fall Term, 1974).

14. *Bobby Hines*: Edgecombe County Super. Ct. No. 73-Cr-7238 (Dec. 9, 1973) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 15 (Fall Term, 1974).

15. *Jesse Lee Walston*: Edgecombe County Super. Ct. No. 73-Cr-7239 (Dec. 9, 1973) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 15 (Fall Term, 1974).

16. *George Vick*: Beaufort County Super. Ct. No. 73-Cr-5687 (Dec. 12, 1973) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 15 (Fall Term, 1974).

17. *Frank Pruitt*: Cumberland County Super. Ct. Nos. 73-Cr-35545, 73-Cr-35546, 73-Cr-35547, 73-Cr-35548 (Jan. 29, 1974) (death sentence for first degree murder and arson); *appeal pending*, N.C. Sup. Ct. No. 24 (Spring Term, 1974).

18. *Reginald Renard Lampkins*: Forsyth County Super. Ct. No. 73-Cr-43023 (Jan. 18, 1974) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 22 (Spring Term, 1974)

19. *Vernon Junior Woods*: Catawba County Super. Ct. Nos. 73-Cr-20545, 73-Cr-20546, 73-Cr-20547 (Jan. 29, 1974) (death sentence for first degree murder and rape); *appeal pending*, N.C. Sup. Ct. No. 25 (Spring Term, 1974).

20. *Bryant Henry Williams, Jr.*: Wake County Super. Ct. No. 73-Cr-32521 (Jan. 31, 1974) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 25 (Spring Term, 1975).

21. *George James Patterson*: Forsyth County Super. Ct. No. 73-Cr-22457 (Feb. 5, 1974) (death sentence for first degree murder); *appeal pending*, N.C. Sup. Ct. No. 29 (Spring Term, 1974).

22. *Lawrence McCall*: Transylvania County Super. Ct. Nos. 73-Cr-1821 and 73-Cr-1829 (Feb. 9, 1974) (death sentence for first degree murder); *appeal pending*, N.C. Sup. Ct. No. 28 (Fall Term, 1974)

23. *James Avery*: Bertie County Super. Ct. No. 73-Cr-2247 (Feb. 17, 1974) (death sentence for first degree murder); *appeal pending* N.C. Sup. Ct. No. 27 (Fall Term, 1974).

24. *Alexander McLaughlin*: Robeson County Super. Ct. Nos. 73-Cr-18024, 74-Cr-228, 74-Cr-229, 74-Cr-230, 74-Cr-231 and 74-Cr-232 (Feb. 28, 1974) (death sentences for first degree murder and arson); *appeal pending*, N.C. Sup. Ct. No. 29 (Fall Term, 1974).

25. *Michael Burns*: Onslow County Super. Ct. No. 74-Cr-1012 (Mar. 1, 1974) (death sentence for rape).

26. *Robert Gary Bock*: Moore County Super. Ct. No. 73-Cr-6324 (Mar. 8, 1974) (death sentence for first degree murder).

27. *Ernest Armstrong*: Harnett County Super. Ct. No. 73-Cr-10951 (Mar. 21, 1974) (death sentence for rape).

28. *Ernest John Vinson*: Wilson County Super. Ct. No. 73-Cr-9325 (Mar. 27, 1974) (death sentence for rape).

29. *Frank James Silver*: Nash County Super. Ct. No. 74-Cr-192 (April 4, 1974) (death sentence for first degree murder).

30. *John Richard Stegmann*: Cumberland County Super. Ct. No. 73-Cr-30527 (May 16, 1974 (death sentence for rape).

31. *Richard Gordon*: Mecklinberg County Super. Ct. Nos 73-Cr-56187 and 73-Cr-56188 (May 29, 1974) (death sentence for first degree murder).

32. *Timothy Wesley Robbins*: Guilford County Super. Ct. Nos. 74-Cr-19674, 74-Cr-19770 and 74-Cr-19771 (May 31, 1974) (death sentence for first degree murder).

33. *Charles D. Thompson*: Rutherford County Super. Ct. No. 74-Cr-1222 (June 1, 1974) (death sentence for first degree murder).

34. *Wayne Foddrell*: Caswell County Super. Ct. No. 73-Cr-1439 (June 7, 1974) (death sentence for rape).

35. *Rozell Oxendine Hunt*: Anson County Super. Ct. No. 74-Cr-1538 (June 13, 1974) (death sentence for first degree murder).

36. *Crawford Dean Lowery*: Alamance County Super. Ct. No. 73-Cr-8718 (June 13, 1974) (death sentence for rape).

37. *Fernando Hunt*: Vance County Super. Ct. Nos. 74-Cr-550, 74-Cr-551 and 74-Cr-552 (June 13, 1974) (death sentence for rape).

38. *Ernest Ray Simmons*: Nash County Super. Ct. No. 74-Cr-194 (June 14, 1974) (death sentence for first degree murder).

39. *Tharroy Davis*: Lenoir County Super. Ct. Nos. 74-Cr-1102, 74-Cr-1103 (June 16, 1974) (death sentence for first degree murder).

40. *Joseph Clinton Foster*: Lenoir County Super. Ct. Nos. 74-Cr-1248, 74-Cr-1249 (June 16, 1974) (death sentence for first degree murder).

41. *Thurman Lee Strickland*: Ouslow County Super. Ct. Nos. 74-Cr-3671, 74-Cr-3672, 74-Cr-10568 (June 29, 1974) (death sentence for first degree murder).

42. *Johnny Hennesy Boyd*: Lincoln County Super. Ct. No. 74-Cr-4806 (July 27, 1974) (death sentence for first degree burglary).

43. *Bobby Clinton Foster*: Mecklinberg County Super. Ct. Nos. 74-Cr-1600, 74-Cr-1601 (Nov. 22, 1974) (death sentence for first degree murder).

44. *Thomas Lee King*: Gaston County Super. Ct. No. 74-Cr-4357 (Aug. 1, 1974) (death sentence for first degree murder).

45. *Joseph King*: Gaston County Super. Ct. No. 74-Cr-4358 (Aug. 1, 1974) (death sentence for first degree murder).

46. *Roger Lawrence Wetmore*: Rowan County Super. Ct. No. 74-Cr-2010 (Aug. 2, 1974) (death sentence for first degree murder).

47. *Ronnie Young*: Mecklinberg County Super. Ct. Nos. 73-Cr-56206, 73-Cr-56207 (Aug. 8, 1974) (death sentence for first degree murder).

48. *Joe Lewis White*: Scotland County Super. Ct. No. 74-Cr-2007 (Aug. 15, 1974) (death sentence for first degree murder).

49. *James Edward Britt*: Robeson County Super. Ct. No. 73-Cr-6567 (Sept. 20, 1974) (death sentence for first degree murder).

50. *Larry Bernard*: New Hanover County Super. Ct. No. 73-Cr-20420 (Oct. 3, 1974) (death sentence for rape).

51. *Pinkney Thomas Mitchell, Jr.*: Gaston County Super. Ct. No. 74-Cr-9519 (Oct. 30, 1974) (death sentence for first degree murder).

52. *David B. Smith*: Mecklinberg County Super. Ct. Nos. 74-Cr-1598, 74-Cr-1599 (Nov. 22, 1974) (death sentence for first degree murder).

APPENDIX C

REPRESENTATIVE NORTH CAROLINA HOMICIDE CASES

In the following cases, which present a variety of factual elements resembling those of petitioner's case, juries chose to convict the defendants of less than first degree murder. In some of these cases, the lesser convictions were reversed on appeal for trial errors which, when corrected, might have produced dispositions even more favorable to the defendants.

Second Degree Murder Convictions

State v. Cole, 280 N.C. 398, 185 S.E.2d 833 (1972).
State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971), *aff'd on remand*, 17 N.C. App. 239, 193 S.E.2d 475 (1972).
State v. Fields, 279 N.C. 460, 183 S.E.2d 666 (1971).
State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).
State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971).
State v. Kirby, 273 N.C. 306, 160 S.E.2d 24 (1968).
State v. Feaganes, 272 N.C. 246, 158 S.E.2d 89 (1967).
State v. Barber, 270 N.C. 222, 154 S.E.2d 104 (1967).
State v. Johnson, 270 N.C. 215, 154 S.E.2d 48 (1967).
State v. Kea, 256 N.C. 492, 124 S.E.2d 174 (1962).
State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960).
State v. Wagoner, 249 N.C. 637, 107 S.E.2d 83 (1959).
State v. Morgan, 245 N.C. 215, 95 S.E.2d 507 (1956).
State v. Wingler, 238 N.C. 485, 78 S.E.2d 303 (1953).
State v. Russell, 233 N.C. 487, 64 S.E.2d 579 (1951).
State v. Taylor, 226 N.C. 286, 37 S.E.2d 901 (1946).

State v. Miller, 223 N.C. 184, 25 S.E.2d 623 (1943).
State v. Terrell, 212 N.C. 145, 193 S.E. 161 (1937).
State v. Godwin, 211 N.C. 419, 190 S.E. 761 (1937).
State v. Holland, 193 N.C. 713, 138 S.E. 8 (1927).
State v. Brinkley, 183 N.C. 720, 110 S.E. 783 (1922).
State v. Evans, 177 N.C. 564, 98 S.E. 788 (1919).
State v. Johnson, 176 N.C. 722, 97 S.E. 14 (1918).
State v. Gentry, 125 N.C. 733, 34 S.E. 706 (1899).
State v. Gibbs, 5 N.C. App. 457, 168 S.E.2d 507 (1969).

Manslaughter Convictions

State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).
State v. Tart, 280 N.C. 172, 184 S.E.2d 842 (1971).
State v. Gladden, 279 N.C. 566, 184 S.E.2d 249 (1971).
State v. Woods, 278 N.C. 210, 179 S.E.2d 358 (1971).
State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971).
State v. Jennings, 276 N.C. 157, 171 S.E.2d 447, (1970) *aff'd on remand*, 279 N.C. 604, 184 S.E.2d 254 (1971).
State v. Cooper, 273 N.C. 51, 159 S.E.2d 305 (1968).
State v. Benge, 272 N.C. 261, 158 S.E.2d 70 (1967).
State v. Price, 271 N.C. 521, 157 S.E.2d (1967).
State v. Miller, 267 N.C. 409, 148 S.E.2d 279 (1966).
State v. Camp, 266 N.C. 626, 146 S.E.2d 643 (1966).
State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).
State v. Johnson, 261 N.C. 727, 195 S.E.2d 824 (1964).
State v. Davis, 259 N.C. 138, 129 S.E.2d 894 (1963).
State v. Gay, 251 N.C. 78, 110 S.E.2d 458 (1959).
State v. Fowler, 250 N.C. 595, 108 S.E.2d 892 (1959).
State v. Mangum, 245 N.C. 323, 96 S.E.2d 39 (1956).

State v. Ellis, 241 N.C. 702, 86 S.E.2d 272 (1955).
State v. Street, 241 N.C. 689, 86 S.E.2d 277 (1955).
State v. Rawley, 237 N.C. 233, 74 S.E.2d 620 (1953).
State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951).
State v. Sally, 233 N.C. 225, 63 S.E.2d 151 (1951).
State v. Suddreth, 230 N.C. 239, 52 S.E.2d 924 (1949).
State v. Church, 229 N.C. 718, 51 S.E.2d 345 (1949).
State v. Grant, 228 N.C. 522, 46 S.E.2d 318 (1948).
State v. Correll, 228 N.C. 28, 44 S.E.2d 334 (1947).
State v. Pennell, 224 N.C. 622, 31 S.E.2d 857 (1944).
State v. Baker, 222 N.C. 428, 23 S.E.2d 340 (1942).
State v. DeGraffenreid, 222 N.C. 113, 22 S.E.2d 217 (1942).
State v. Lefevers, 221 N.C. 184, 19 S.E.2d 488 (1942).
State v. Beachum, 220 N.C. 531, 17 S.E.2d 674 (1941).
State v. Roddey, 219 N.C. 532, 14 S.E.2d 526 (1941).
State v. Shepherd, 220 N.C. 377, 17 S.E.2d 469 (1941).
State v. Bright, 215 N.C. 537, 2 S.E.2d 541 (1939).
State v. Bryant, 213 N.C. 752, 197 S.E. 530 (1938).
State v. Reynolds, 212 N.C. 37, 192 S.E. 871 (1937).
State v. Thornton, 211 N.C. 413, 190 S.E. 758 (1937).
State v. Marshall, 208 N.C. 127, 179 S.E. 427 (1935).
State v. Bost, 192 N.C. 1, 133 S.E. 176 (1926).
State v. Jones, 188 N.C. 142, 124 S.E. 121 (1924).
State v. Baldwin, 184 N.C. 789, 114 S.E. 837 (1922).
State v. Carraway, 181 N.C. 561, 107 S.E. 142 (1921).
State v. Davis, 175 N.C. 723, 95 S.E. 48 (1918).
State v. Hand, 170 N.C. 703, 86 S.E. 1005 (1915).
State v. Pollard, 168 N.C. 116, 83 S.E. 167 (1914).
State v. Yates, 155 N.C. 450, 71 S.E. 317 (1911).
State v. Rowe, 155 N.C. 436, 71 S.E. 332 (1911).

State v. Hough, 138 N.C. 663, 50 S.E. 709 (1905).
State v. Sumner, 130 N.C. 718, 41 S.E. 803 (1902).
State v. Walker, 22 N.C. App. 22, 205 S.E.2d 328 (1974).
State v. Barrett, 20 N.C. App. 419, 201 S.E.2d 553 (1974).
State v. Davis, 18 N.C. App. 436, 197 S.E.2d 6 (1973).
State v. Brice, 17 N.C. App. 189, 193 S.E.2d 299 (1972).
State v. Lynn, 16 N.C. App. 566, 192 S.E.2d 608 (1972).
State v. Jefferies, 16 N.C. App. 235, 192 S.E.2d 104 (1972).
State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972).
State v. Edwards, 8 N.C. App. 296, 174 S.E.2d 28 (1970).
State v. Clontz, 6 N.C. App. 587, 170 S.E.2d 624 (1969).
State v. Hurdle, 5 N.C. App. 610, 169 S.E.2d 17 (1969).
State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

APPENDIX D

WORLDWIDE TRENDS IN THE USE OF THE DEATH PENALTY

In a report for the United Nations Department of Economic and Social Affairs describing developments in the use of the death penalty during the years 1961 to 1965, Professor Norval Morris summarized his findings as follows:

> ". . . [t]here is an over-all tendency in the world towards fewer executions. This is the result of less frequent use of the death penalty in those States whose statutes provide for that penalty, and of a steady movement towards legislative abolition of capital punishment."[1d]

In a 1971 supplemental report to the Economic and Social Council, the Secretary-General of the United Nations concluded:

> ". . . [t]here is still a clear trend towards total abolition. Most countries are gradually restricting the number of offences for which the death penalty can be applied and a few have totally abolished capital offences even in wartime. Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority. . . ."[2d]

[1d]UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) 81-82 (1968) [hereafter cited as UNITED NATIONS].

[2d]UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, Capital Punishment (E/4947) 3 (February 23, 1971) [hereafter cited as Secretary-General's Note].

A variety of factors hamper somewhat any attempt to generalize upon the data summarized by these statements. No study has successfully sought data from all jurisdictions competent to retain or abolish capital punishment; many otherwise abolitionist jurisdictions retain the death penalty for extraordinary offenses or emergency circumstances; several jurisdictions have failed to reflect *de facto* abolition in positive law.[3d] A consideration of trends over the last two centuries, moreover, is complicated by the movements of several jurisdictions which have abolished the death penalty and subsequently reintroduced it.

Nonetheless, when these vacillating movements are put out of account by focusing upon countries which have abolished capital punishment and never restored it (and when "abolition" is used to mean the termination of capital punishment for the ordinary violent civilian crimes: murder, rape, robbery, arson, and kidnaping), definite historical trends are clearly apparent.

Table I lists abolitionist jurisdictions outside the United States by year of *de jure* abolition, except for Lichtenstein, Luxembourg, Nicaragua, and Surinam, for which the last execution year is given to mark the beginning of *de facto* abolition.[4d]

[3d]*See* UNITED NATIONS 8-9; Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 405 (1965) [hereafter cited as Patrick].

[4d]Nine of the listed jurisdictions retain execution as the penalty for certain extraordinary civil offenses (the four Australian jurisdictions, Canada, Israel, Nepal, New Zealand, and United Kingdom); eight permit the death penalty in wartime or under military law (Brazil, Denmark, Finland, Italy, Netherlands, Norway, Sweden and Switzerland); and two executed Nazi collaborators after World War II (Netherlands and Norway).

TABLE I[5d]

Worldwide Abolition

ARGENTINA	1922	LICHTENSTEIN	1798[7d]
AUSTRALIA (Federal)	1945	LUXEMBOURG	1821[7d 9d]
New South Wales	1955	MEXICO (Federal)	1931
Queensland	1922	29 of 32 States	1931-1970
Tasmania	1968	MONACO	
AUSTRIA	1968	MOZAMBIQUE	1867
BELGIUM	1863[6d]	NEPAL	1950
BOLIVIA	1961	NETHERLANDS	1886
BRAZIL	1946	Antilles	1957
CANADA	1967[8d]	NEW ZEALAND	1961
COLUMBIA	1910	NICARAGUA	1892[7d]
COSTA RICA	1880	NORWAY	1905
DENMARK	1930	PANAMA	1915
DOMINICAN REPUBLIC	1924	PORTUGAL	1867
EUCADOR	1897	SAN MARINO	1848
FINLAND	1949	SURINAM	1927[10d]
GERMANY, West	1949	SWEDEN	1921
GREENLAND	1954	SWITZERLAND	1942
HONDURAS	1957	UNITED KINGDOM	
ICELAND	1940	Great Britain	1965
INDIA		Northern Ireland	1966
Travencore	1944	URUGUAY	1907
ISRAEL	1954	VATICAN CITY STATE	
ITALY	1944	VENEZUELA	1863

[5d] Sources for this table are: UNITED NATIONS; Secretary-General's Note; ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES (Council of Europe, European Committee on Crime Problems, 1962) [hereafter cited as ANCEL]; JOYCE, CAPITAL PUNISHMENT: A WORLD VIEW (1961); UNIVERSITY OF COIMBRA, FACULTY OF LAW, PANA DE MORTE (1967); Patrick.

[6d] Excludes one soldier executed in 1918.

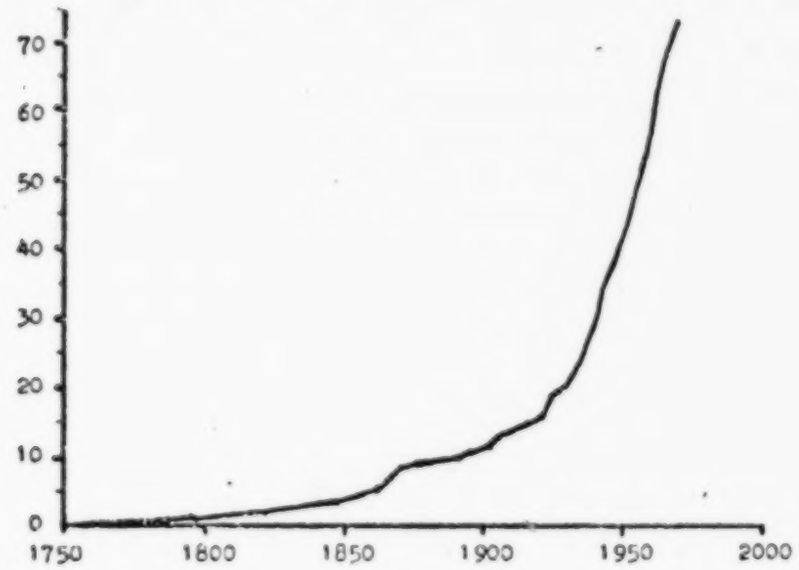
[7d] *De facto* only; date is last execution.

[8d] Statute abolishing capital punishment for murder expires in 1977 if not renewed.

[9d] Excludes one.

[10d] Excludes one.

Chart I displays the data contained in Table I. Although, as of 1970, abolitionist jurisdictions comprised far less than half of all the nations of the world, there is evidence of a definite, continuing, long-term, accelerating, worldwide trend toward ending the use of the penalty of death. Every decade since 1800 has shown growth in the total number of abolitionist jurisdictions; and during the past century the number of jurisdictions abandoning capital punishment in any given decade has been greater than the number in the preceding decade.



Actual use of the death penalty is exceedingly rare.[11d] Estimates of the total number of executions in the world today must necessarily remain speculative, but the figure probably does not much exceed the 560 executions estimated to have occurred in London and

[11d] Patrick, whose execution figures appear to be somewhat high (*see* note 12d *infra*), found that out of 89 countries which made legal provision for the death penalty during the period 1958-1962, there were 36 which executed not a single human being through the five-year period. Patrick 409. *See also* UNITED

(continued)

Middlesex alone each year during the mid-sixteenth century.[12d] These figures are assuredly very crude, but in general terms they mark the magnitude of the trend

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NATIONS 96. Patrick reports 13 additional countries which conducted fewer than one execution per year; 24 countries which conducted one to five executions; 10 countries which conducted between fifty and one hundred executions. Patrick 409. The Republic of South Africa appears to be the known world leader in executions, averaging about one hundred per year. Kahn, *The Death Penalty in South Africa*, 18 TYDKSKRIF VIR HEDEND-AAGES ROMEINS-HOLLANDSE REG. 108, 116-118 (1970) [hereafter cited as Kahn].

[12d]The derivation of the average annual figure of 560 for the last decade of the reign of Henry VIII and throughout the reign of Edward VI is set forth in 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 142 n.20 (1948).

An annual average total of about 535 executions is reported for the period 1958-1962 by Patrick, for the major capital-punishment countries of the world, excluding the communist nations and eleven non-communist nations (some of them relatively populous). Patrick 408. However, there are reasons to believe that this figure is inaccurately large. Where there is overlapping between the numbers of executions reported by Patrick and the presumably more reliable numbers gathered by the United Nations Department of Economic and Social Affairs for the two periods 1956-1960 and 1961-1965, Patrick's figures are consistently higher. *See* UNITED NATIONS 43-44,96-97. The two reports may be consistent, of course, if executions peaked strongly in the middle of the 1956-1965 period, but there is no reason to suppose such a peaking. Second, Patrick does not disclose the terms of his inquiries to his correspondents; and it is entirely possible that his reports include executions in political and military

(continued)

toward *de facto* abolition.[13d]

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contexts which should be put out of account for present purposes. Third (a relatively small matter), Patrick's own columnar figures do not total to 535.3, as he says, but to 517.1. Patrick 398-404.

In any event the figures today are almost certainly lower than those for 1962-1963. The United States contributed 48.6 executions per year to Patrick's total, *id.* at 404; and we know that there have been no executions in this country since 1967. Among the nations reporting to the United Nations for both the 1956-1960 and the 1961-1965 periods, there was a sharp decline in executions from the first to the second period (UNITED NATIONS 96-97); a number of nations have abolished capital punishment *de jure* since 1962; and the only country in the world where it is definitively known that executions have been on the increase is the Republic of South Africa (Kahn, 116; *and compare* Van Niekerk, *The Administration of Justice, Law Reform and Jurisprudence*, [1967] ANNUAL SURVEY OF SOUTH AFRICAN LAW 444, 471-472, *with* Patrick). Projecting the 40% decrease found in the United Nations figures for countries which reported during both of its reporting periods, and assuming that the extent to which American executions have exceeded the 40% rate more than offsets the increase in South Africa, there would be fewer than 200 executions a year today in the countries studied by Patrick. We would have to nearly treble that figure, in consideration of the communist and eleven non-communist countries—surely a generous allowance—in order to bring the world total to 560.

[13d]*See* ANCEL 12: "Abolition in law has in almost all cases been preceded by abolition in practice. . . ."

APPENDIX E

THE EVIDENCE CONCERNING THE DETERRENT EFFICACY OF THE DEATH PENALTY

This appendix describes the findings of the numerous studies conducted during recent decades concerning the deterrent efficacy of capital punishment. Part A sets forth the conclusions of social scientists who have tested statistically the hypothesis that capital punishment is superior to imprisonment as a deterrent of the crime of murder. Part B evaluates the anecdotal impressions of law enforcement officers on the same subject.

A. The Statistical Evidence

It is no exaggeration to report that scientific studies of the deterrent effect of capital punishment speak with rare and compelling unanimity. Recent studies are presaged by the conclusions of George B. Vold in 1932 that "the death penalty does not and can not prevent crime either specifically in regard to murder or more generally in regard to other kinds of crime,"[1e] and Robert H. Dann in 1935 that "the homicide rate can never be materially affected, one way or the other, by the present program of executions. . . ."[2e]

[1e]Vold, *Can the Death Penalty Prevent Crime?*, 12 PRISON J. (No. 4) 4, 9 (1932).

[2e]Dann, *The Deterrent Effect of Capital Punishment*, FRIENDS SOCIAL SERVICE SERIES, Bulletin No. 29 (Third Month) 19 (1935).

A number of post-war studies were based on the data collected during the intensive efforts of the British Royal Commission on Capital Punishment, between 1949 and 1953.[3e] That data led all informed students of the subject to conclude: "it is not true to say that capital punishment is in practice a greater deterrent than other forms of severe punishment."[4e] The conclusion of the Commission itself, confined as it was by its limited terms of reference, was: "[i]t is . . . important . . . not to base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty."[5e] And the Commission carefully noted that "it is impossible to arrive confidently at any firm conclusion about the deterrent effect of the death penalty, or indeed of any form of punishment."[6e] But this caution and its technically delimited conclusion do not obscure the Commission's assessment of the statistical evidence before it:

> ". . . [we] agree with Professor Sellin that the only conclusion which can be drawn from the figures is that there is no clear evidence of any influence of the death penalty on the homicide

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[3e]*See* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT (H.M.S.O. 1953) [Cmd. 8932] [hereinafter cited as ROYAL COMMISSION].

[4e]GARDINER, CAPITAL PUNISHMENT AS A DETERRENT: AND THE ALTERNATIVE 31 (1956). *Accord:* GOWERS, A LIFE FOR A LIFE 138 (1956); Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U.L.REV. 433, 458 (1957). *See also* KOESTLER, REFLECTIONS ON HANGING 59 (Amer. ed. 1957).

[5e]ROYAL COMMISSION 24.

[6e]*Ibid.*

rates of these States [principally neighboring abolitionist and retentionist jurisdictions of the United States, systematically studied by Sellin] and that, 'whether the death penalty is used or not and whether executions are frequent or not, both death-penalty States and abolition States show rates which suggest that these rates are conditioned by other factors than the death penalty.' "

"... [t]he general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall."[7e]

The conclusion of the more recent study made under the auspices of the European Committee on Crime Problems of the Council of Europe is in full accord with the Royal Commission's findings. "Even a cursory examination of the statistics on the subject for [Council of Europe]. . .countries shows that they give no positive indication regarding the value of capital punishment as a deterrent".[8e]

Contemporary criminologists who have studied deterrence and the death penalty in the United States speak with one voice in summarizing their conclusions from the evidence:

"Capital punishment has had no appreciable influence on the murder rate in the states which have been investigated."[9e]

[7e] *Id.* at 23.

[8e] ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES 45-46.(Council of Europe, European Committee on Crime Problems, (1962)).

[9e] Andenaes, *Does Punishment Deter Crime?* 11 CRIM. L. Q. 76, 83 (1968).

"Capital punishment does not act as an effective deterrent to murder."[10e]

"Capital punishment is ineffective in deterring murder."[11e]

"The use or non-use of capital punishment has no effect on the number of murders committed within a state or the nation."[12e]

"The evidence indicates that [the death penalty for murder]. . .has no discernible effects in the United States."[13e]

"Statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value."[14e]

"The death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes."[15e]

"The studies [of capital punishment] suggest no discernible relationship between the presence of the death penalty and homicide rates."[16e]

[10e] Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WISC. L. REV. 703,706.

[11e] Doleschal, *The Deterrent Effect of Legal Punishment: A Review of Literature*, 1 INFORMATION REVIEW ON CRIME & DELINQ.(No. 7)7 (1969).

[12e] LUNDEN, THE DEATH PENALTY 22 (1960).

[13e] Reckless, *The Use of the Death Penalty–A Factual Statement*, 15 CRIME & DELINQ. 43, 52 (1969).

[14e] Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 62 (1952).

[15e] SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959) 63 [hereafter cited as SELLIN (1959)].

[16e] ZIMRING, PERSPECTIVES ON DETERRENCE 17 (Nat'l Institute of Mental Health, January 1971).

"The capital punishment controversy has produced the most reliable information on the general deterrent effect of a criminal sanction. It now seems established and accepted that . . . the death penalty makes no difference to the homicide rate."[17e]

These general conclusions rest upon the following results of statistical inquiries into specific aspects of the deterrence question:

Death penalty jurisdictions do not have a lower rate of criminal homicide than abolition jurisdictions.[18e]

Given two states otherwise similar in factors that might affect homicide rates, and differing in that one employs capital punishment while the other does not, the abolition state does not show any consistently higher rate of criminal homicide.[19e]

Jurisdictions which abolish the death penalty do not therefore show an increased rate of criminal homicide.[20e]

Jurisdictions which reintroduce the death penalty after having abolished it do not show a

[17e]Morris and Zimring, *Deterrence and Corrections*, 381 ANNALS 137, 143 (1969).

[18e]Schuessler, *supra* note 14e, at 57; Reckless, *supra* note 13e, at Table 9.

[19e]SELLIN (1959) 23-24; SELLIN, CAPITAL PUNISHMENT 135-138 (1967) [hereafter cited as SELLIN (1967)].

[20e]FATTAH, A STUDY OF THE DETERRENT EFFECT OF CAPITAL PUNISHMENT WITH SPECIAL REFERENCE TO THE CANADIAN SITUATION (Department of the Solicitor General, Canada, Research Centre Report No. 2, 1972) [hereafter cited as FATTAH]; SELLIN (1959) 34-38. SELLIN (1967) 122-124; Samuelson, *Why Was Capital Punishment Restored in Delaware?*,60 J. CRIM. L., CRIM. & POL. SCI. 148, 150-151 (1969).

decreased rate of criminal homicide after reintroduction.[21e]

Police officers on duty do not suffer a higher rate of criminal assault and homicide in abolition jurisdictions than in death penalty jurisdictions.[22e]

Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.[23e]

A post-*Furman* investigation of the operation of mandatory death penalty provisions in "all jurisdictions for which homicide rates are available for at least three years before and after the change from mandatory to discretionary capital punishment for murder" "found no indication that the mandatory death penalty was a more effective deterrent of homicide than discretionary capital punishment."[24e]

[21e]SELLIN (1959) 34-38; SELLIN (1967) 122-124; Samuelson, note 20e *supra*, at 150-151.

[22e]Sellin, *Does the Death Penalty Protect Municipal Police?*, in BEDAU, THE DEATH PENALTY IN AMERICA 294-301 (rev. ed. 1967) [hereafter cited as BEDAU]; Campion, *Does the Death Penalty Protect the State Police?*, in BEDAU 301-315.

[23e]MASSACHUSETTS SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS 21-22 (1958); SELLIN (1967) 154-160; Sellin, *Homicides and Assaults in American Prisons, 1964*, 31 ACTA CRIMINOLOGIAE ET MEDICINAE LEGALIS JAPONICA 139 (1965).

[24e]BOWERS, EXECUTIONS IN AMERICA 160 (1974).

B. Impressions of Law Enforcement Officers

Law enforcement officers frequently dismiss the statistical evidence set forth above because they say that it fails to prove that the threat of capital punishment never deterred a murder which would have occurred if imprisonment had been the only risk run by the murderer.[25e] Police spokesmen invariably base their own belief in the deterrent efficacy of the death penalty entirely upon impressionistic bases,[26e] and upon the quoted statements of criminals (made to police officers following their arrests) claiming that they carried toy guns in robberies out of fear of the death penalty.[27e] It would be improper, certainly, to reject the intuitions of the police out of hand, or to assert categorically that the fear of death never has dissuaded any putative murderer from his crime. However, several circumstances render these police opinions gravely suspect as a foundation for the present-day American use of death as a penalty for first-degree murder.

First, correctional officials, whose knowledge of criminal offenders is at least as informed as that of the police, generally do not believe that the death penalty

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[25e] *E.g.*, Hoover, *Statements in Favor of the Death Penalty*, in BEDAU 130; Allen, *Capital Punishment: Your Protection and Mine*, in BEDAU 135.

[26e] *See* ROYAL COMMISSION 18-24; CANADA, JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL AND CORPORAL PUNISHMENT AND LOTTERIES; REPORT ¶¶29-33, 43-50 (1956); NEW JERSEY, COMMISSION TO STUDY CAPITAL PUNISHMENT, REPORT 8-9 (1964).

[27e] *E.g.*, Desky, *Should Capital Punishment be Abolished in California?*, 39 THE COMMONWEALTH 19, 23 (November 11, 1963).

is a superior deterrent to imprisonment.[28e] They and other knowledgeable observers agree that a very large proportion of the crimes which are defined by law as first-degree murders and made punishable by death are not the product of rational choice which the threat of the extreme penalty can deter.[29e] Second, when a murder *is* the product of rational choice in the sense that it can be affected by the threat of punishment, the threat of death punishment is so attenuated by its uncertainty as to become minimally significant.[30e] Third, the number of "toy gun" incidents and similar cases in which criminals assert that their behavior was affected by the threat of the death penalty remains

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[28e] DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 257 (1962); Testimony of Clinton T. Duffy, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S.1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 22-23 (G.P.O. 1970) [hereafter cited as *Hearings*]; Thomas, *Attitudes of Wardens Toward the Death Penalty*, in BEDAU 242. *And see* National Council on Crime and Delinquency, Board of Trustees, *Policy Statement on* Capital Punishment, 10 CRIME & DELINQ. 105 (1964).

[29e] LAWES, LIFE AND DEATH IN SING SING 144-145 (1928); Testimony of Clinton T. Duffy, in *Hearings*, at 23; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 256 (1962); *see* WEIHOFEN, THE URGE TO PUNISH 150-152 (1956); PLAFAIR & SINGTON, THE OFFENDERS 228 (1957); Statement of Attorney General Ramsey Clark, in *Hearings*, at 92; Ancel, *The Problem of the Death Penalty* in SELLIN (1967) 3, 17; (1967); Sellin, *The Inevitable End of Capital Punishment*, in SELLIN (1967) 239, 249-250; McNamara, *Statement Against Capital Punishment*, in BEDAU 182, 185-185; Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 61-62 (1952); Caldwell, *Why Is The Death Penalty Retained?*, 284 ANNALS 45, 51 (1952).

[30e] *See* WEIHOFEN, THE URGE TO PUNISH 159-164 (1956); BEDAU 270.

uncounted, but (even if the reports are reliable)[31e] these cases must be few, since they register no impact upon any known comparison of homicide rates in abolition and death-penalty jurisdictions or eras. See Part A, *supra*. Of course, it may be that such cases are offset by the equally unknown number of instances of the clinically documented converse phenomenon of "suicide-by-homicide": that is, the cases of killers who kill in order to force society to kill them in return.[32e] In any event, one thing seems plain. The police impressions and anecdotes do not point to any factor, unaccounted for by the statistical studies, which would explain why the studies consistently fail to reflect appreciable deterrent effects of the death penalty if they exist.

Finally, when inmates were examined in an experimental context by psychiatrists rather than by law enforcement officers, (and thus without substantial danger that the interviews were distorted by implicit coercive influences) quite different opinions were expressed:

[31e]They seem unlikely to be very reliable, since an arrested man will understandably tell a policeman what he thinks the policeman wants to hear. *See* Testimony of Clinton T. Duffy, in *Hearings*, at 23.

[32e]West, *Medicine and Capital Punishment*, in *Hearings*, at 124, 126-127; SELLIN (1959) 65-69; BEDAU 264 n.7; Gold, *Suicide, Homicide, and the Socialization of Aggression*, 63 AM. J. SOCIOLOGY 651 (1958); Neiberg, *Murder and Suicide*, 4 ARCH. CRIM. PSYCHODYNAMICS 253 (1961); OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT No. 46, CAPITAL PUNISHMENT 49 (1961); FATTAH 39-40.

"[t]he population interviewed gave no support to the concept that capital punishment deters major crime."[33e]

[33e]Pakola & Sadoff, *Capital Punishment: A Deterrent for Major Crime?*, in GOVERNOR'S STUDY COMMISSION ON CAPITAL PUNISHMENT, REPORT 115, 126-127 (Commonwealth of Pennsylvania 1973).